HCJ 4885/03

Israel Poultry Farmers Association Agricultural Cooperative Society Ltd and others

v.

1. Government of Israel

2. Minister of Agriculture and Village Development

3. Minister of Finance

HCJ 4900/03

Vegetable Growers Association Agricultural Cooperative Society Ltd and others

v.

1. Government of Israel

2. Minister of Agriculture and Village Development

3. Minister of Finance

HCJ 4899/03

Fruit (Production and Marketing) Board and others

v.

1. Government of Israel

2. Minister of Agriculture and Village Development

3. Minister of Trade and Industry

4. Minister of Finance

5. Attorney-General

HCJ 4918/03

Federation of Israeli Farmers Society

v.

1. Knesset – Chairman of Knesset

2. Government of Israel

3. Minister of Agriculture and Village Development
4. Minister of Finance
5. Attorney-General

The Supreme Court sitting as the High Court of Justice
[27 September 2004]
Before President A. Barak and Justices M. Cheshin, D. Beinisch

Petition to the Supreme Court sitting as the High Court of Justice

Facts: The Knesset enacted the Israel Economic Recovery Programme (Legislative Amendments for Achieving Budgetary Goals and the Economic Policy for the 2003 and 2004 Fiscal Years) Law, 5763-2003, which contained, in chapter 11, major changes to the regulation of the agricultural sector in Israel. This law, which contains many diverse provisions, was passed in a rushed process with very little debate either in the House or the committees of the Knesset.

The petitioners claimed, for a wide variety of reasons, that chapter 11, the 'Agriculture Chapter,' should be declared void. *Inter alia*, they argued that the Agriculture Chapter violated basic rights, such as property rights and the freedom of occupation, and that the process that led to its legislation was so defective that it ought to be declared void.

Held: The court found that the Israel Economic Recovery Programme Law was an excessive and improper use of the legislative mechanism of the Arrangements Law type and criticized the use of such expedited legislative mechanisms. The court held, however, that judicial review of the legislative process in Israel does not recognize a ground of a lack of 'legislative due process,' and the court will only intervene if there is a defect in the legislative process that 'goes to the heart of the process.' A defect that 'goes to the heart of the process' is a defect that involves a severe and substantial violation of the basic principles of the legislative process in Israel's parliamentary and constitutional system. In this case, there was no such defect, and therefore no judicial intervention was justified.

While the Agriculture Chapter did violate basic rights, such as property rights and the freedom of occupation, the manner in which it did so, according to the court's interpretation of the law, was not disproportionate, and therefore the violations fell within the scope of the limitations clause in the Basic Laws.

Petitions denied.

Legislation cited:

Basic Law: Freedom of Occupation, s. 3.

Basic Law: Human Dignity and Liberty, s. 3.

Basic Law: the Knesset, ss. 1, 19, 25, 27, 28.

Citrus Fruit (Supervision and Marketing) Ordinance, 5708-1948

Citrus Fruit Marketing Ordinance, 1947.

Citrus Fruit Supervision Ordinance, 1940.

Emergency State Economy Arrangements Law, 5746-1985, s. 1.

Fruit (Production and Marketing) Board Law, 5733-1973.

Israel Economic Recovery Programme (Legislative Amendments for Achieving Budgetary Goals and the Economic Policy for the 2003 and 2004 Fiscal Years) Law, 5763-2003, ss. 49(50), 56, chapter 11.

Knesset Procedure Rules, ss. 13, 113(c), 117(a), 125, 128(b)(2), 129, 130, 131, 133(c), chapter 7.

Ornamental Plant (Production and Marketing) Board Law, 5736-1976

Plant (Production and Marketing) Board Law, 5733-1973, ss. 4, 4(b)(1), 7(e)(1), 7(e)(2), 10(a), 10A, 10A(b), 10A(e), 11, 37(a), 41, 73(b), 73(d), 73(f), 74, 74(a), 74(a)(5), 75, 75(a).

Poultry (Production and Marketing) Board Law, 5724-1963, ss. 9, 76, 77, 77(a).

State Economy Arrangements (Legislative Amendments for Achieving the Budget Goals and the Economic Policy for the 2003 Fiscal Year) Law, 5763-2002, chapter 3.

State Economy Arrangements (Legislative Amendments for Achieving Budgetary Goals and the Economic Policy for the 2002 Fiscal Year) Law, 5762-2002.

Vegetable Production and Marketing Board Law, 5719-1959.

Israeli Supreme Court cases cited:

[1] HCJ 410/91 *Bloom v. Knesset Speaker* [1992] IsrSC 46(2) 201.

[2] HCJ 3267/97 *Rubinstein v. Minister of Defence* [1998] IsrSC 52(5) 481; **[1998-9] IsrLR 139**.

[3] HCJ 742/84 *Kahana v. Knesset Speaker* [1985] IsrSC 39(4) 85.

[4] HCJ 669/85 *Kahana v. Knesset Speaker* [1986] IsrSC 40(4) 393.

[5] HCJ 761/86 *Miari v. Knesset Speaker* [1988] IsrSC 42(4) 868.

[6] HCJ 975/89 *Nimrodi Land Development Ltd v. Knesset Speaker* [1991] IsrSC 45(3) 154.

[7] HCJ 971/99 *Movement for Quality Government in Israel v. Knesset Committee* [2002] IsrSC 56(6) 117.

[8] HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [2001] IsrSC 55(4) 800.

[9] HCJ 8238/96 *Abu Arar v. Minister of Interior* [1998] IsrSC 52(4) 26.

[10] MApp 166/84 *Central Tomechei Temimim Yeshivah v. State of Israel* [1984] IsrSC 38(2) 273.

[11] HCJ 7138/03 *Yanoh-Jat Local Council v. Minister of Interior* [2004] IsrSC 58(5) 709.

[12] HCJ 5160/99 *Movement for Quality Government in Israel v. Constitution, Law and Justice Committee* [1999] IsrSC 53(4) 92.

[13] HCJ 108/70 *Manor v. Minister of Finance* [1970] IsrSC 24(2) 442.

[14] HCJ 5131/03 *Litzman v. Knesset Speaker* [2005] IsrSC 59(1) 577; **[2004] IsrLR** Error! Bookmark not defined.

[15] CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.

[16] HCJ 98/69 *Bergman v. Minister of Finance* [1969] IsrSC 23(1) 693; **IsrSJ 8 13**.

[17] HCJ 246/81 *Derech Eretz Association v. Broadcasting Authority* [1981] IsrSC 35(4) 1; **IsrSJ 8 21**.

[18] HCJ 141/82 *Rubinstein v. Knesset Speaker* [1983] IsrSC 37(3) 141; **IsrSJ 8 60**.

[19] HCJ 73/85 *Kach Faction v. Knesset Speaker* [1985] IsrSC 39(3) 141.

[20] HCJ 7367/97 *Movement for Quality Government in Israel v. Attorney-General* [1998] IsrSC 52(4) 547.

[21] HCJ 306/81 *Flatto-Sharon v. Knesset Committee* [1981] IsrSC 35(4) 118.

[22] HCJ 6124/95 *Ze'evi v. Knesset Speaker* (unreported).

[23] HCJ 297/82 *Berger v. Minister of Interior* [1983] IsrSC 37(3) 29.

[24] HCJ 3975/95 *Kaniel v. Government of Israel* [1999] IsrSC 53(5) 459.

[25] HCJ 1843/93 *Pinhasi v. Knesset* [1994] IsrSC 48(4) 492.

[26] HCJ 1843/93 *Pinhasi v. Knesset* [1995] IsrSC 49(1) 661.

[27] HCJ 3468/03 *Israel Local Authorities Centre v. Government of Israel* (unreported).

[28] HCJ 6791/98 *Paritzky v. Government of Israel* [1999] IsrSC 53(1) 763.

[29] HCJ 266/68 *Petah Tikva Municipality v. Minister of Agriculture* [1968] IsrSC 22(2) 824.

[30] HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235.

[31] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance*

[1997] IsrSC 51(4) 367.
[32] HCJ 5578/02 *Manor v. Minister of Finance* [2005] IsrSC 59(1) 729.
[33] HCJ 4746/92 *G.P.S. Agro Exports Ltd v. Minister of Agriculture* [1994] IsrSC 48(5) 243.
[34] HCJ 198/82 *Munitz v. Bank of Israel* [1982] IsrSC 36(3) 466.
[35] HCJ 4806/94 *D.S.A. Environmental Quality Ltd v. Minister of Finance* [1998] IsrSC 52(2) 193.
[36] LCA 3527/96 *Axelrod v. Property Tax Director, Hadera Region* [1998] IsrSC 52(5) 385.
[37] CA 105/92 *Re'em Contracting Engineers Ltd v. Upper Nazareth Municipality* [1993] IsrSC 47(5) 189.
[38] HCJ 726/94 *Klal Insurance Co. Ltd v. Minister of Finance* [1994] IsrSC 48(5) 441.
[39] HCJ 4915/00 *Communications and Productions Network Co. (1992) Ltd v. Government of Israel* [2000] IsrSC 54(5) 451.
[40] HCJ 4140/95 *Superpharm (Israel) Ltd v. Director of Customs and VAT* [2000] IsrSC 54(1) 49.
[41] AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [2004] IsrSC 58(3) 782.
[42] CA 6576/01 *C.P.M. Promotions Co. Ltd v. Liran* [2002] IsrSC 56(5) 817.
[43] HCJ 508/98 *MaTaV Cable Communication Systems Ltd v. Knesset* [2000] IsrSC 54(4) 577.
[44] LCA 3145/99 *Bank Leumi of Israel Ltd v. Hazan* [2003] IsrSC 57(5) 385.
[45] HCJ 10703/02 *Citrus Fruit Marketing Board v. Government of Israel* (unreported).
[46] HCJ 5992/97 *Arar v. Mayor of Netanya, Poleg* [1997] IsrSC 51(5) 649.
[47] HCJ 4128/02 *Man, Nature and Law Israel Environmental Protection Society v. Prime Minister of Israel* [2004] IsrSC 58(3) 503.

American cases cited:

[48] *United States v. Munoz-Flores*, 495 U.S. 385 (1990).
[49] *United States v. Lopez*, 514 U.S. 549 (1995).
[50] *Board of Trustees v. Garrett*, 531 U.S. 356 (2001).
[51] *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977).
[52] *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

German cases cited:

[53] BVerfGE 80, 188 (1989).

Jewish law sources cited:

[54] Ecclesiastes 1, 9.

For the petitioners in HCJ 4885/03 — T. Manor.

For the petitioners in HCJ 4899/03 — S. Peles, R. Balkin, R. Cohen.

For the petitioners in HCJ 4900/03 — D. Dinai.

For the petitioners in HCJ 4918/03 — Y. Neeman.

For the respondents in all four petitions — D. Briskman, Senior Assistant to the State Attorney and Director of the High Court of Justice Department at the State Attorney's Office.

JUDGMENT

Justice D. Beinisch

The four petitions before us concern the enactment of chapter 11 — the Agriculture Chapter — in the Israel Economic Recovery Programme (Legislative Amendments for Achieving Budgetary Goals and the Economic Policy for the 2003 and 2004 Fiscal Years) Law, 5763-2003 (hereafter — the law or the Economic Recovery Programme Law), and the question of its constitutionality.

The Agriculture Chapter in the aforesaid law (hereafter — the Agriculture Chapter or the chapter) introduces structural reforms in the regulation of several agricultural sectors, of which details are given below. The petitioners in the various petitions are the agricultural boards of those agricultural sectors, organizations of crop farmers and livestock farmers, and private crop farmers and livestock farmers in those sectors, who oppose the aforesaid reforms. The petitioners in HCJ 4899/03, HCJ 4900/03 and HCJ 4918/03 want the whole Agriculture Chapter, or at least certain sections in the chapter, which concern the establishment of the Plant Board and its powers, to be declared void. The petitioners in HCJ 4885/03 want section 56 of the law, which is also found in the Agriculture Chapter and which concerns the Poultry Board, to be declared void. The four petitions were heard by us jointly, and

with the consent of the parties, we determined that we would consider the petitions as if an order *nisi* had been made.

Factual background

1. For several decades, agricultural production boards have been operating in Israel in the various agricultural sectors, including the boards that are the subject of the petitions before us: the Fruit Board, the Vegetable Board, the Ornamental Plant Board, the Citrus Fruit Marketing Board and the Poultry Board (hereafter jointly — the agricultural boards or the boards). These boards were established over the years by statute as statutory boards for the purpose of regulating the various agricultural sectors. The function of the agricultural boards within the framework of this regulatory activity was a dual one: on the one hand, it was their function to develop the agricultural sectors for which they were responsible, to assist the farmers in those sectors and to protect the interests of the farmers, such as by ensuring a fair price for their produce. On the other hand, their function also includes protecting the interests of additional sectors, such as the marketers and exporters of the agricultural produce, as well as the interests of the public as a whole in ensuring a regular supply of the agricultural produce at fair prices to the public, and in regulating the production and marketing in Israel and abroad. This dual function was expressed in the legislation that regulated the activity of the agricultural boards before the Agriculture Chapter, and was even left in force in the current legislation. Thus, for example, s. 11 of the Plant (Production and Marketing) Board Law, 5733-1973 (hereafter — the Plant Board Law) (which replaced, as will be explained below, the Fruit (Production and Marketing) Board Law, 5733-1973 (hereafter — the Fruit Board Law)) provides:

'Functions of the board

> 11. The following are the functions of the board:
>
> (1) To develop, encourage and strengthen the sectors, including improving the processing methods, increasing work productivity and doing any other act of these kinds that may contribute to the development and strengthening of the sectors;
>
> (2) To ensure a fair price for the farmers;
>
> (3) To take steps to reduce production and

marketing expenses;

(4) To ensure a regular supply of plants at fair prices to the public;

(5) To encourage and promote research concerning the sectors and their products, including research about markets, research into marketing and packing methods and similar research;

(6) To regulate the production and marketing in Israel and abroad of every kind of plant that the Minister of Agriculture has determined in a notice in *Reshumot*.'

In the legislation that preceded the Agriculture Chapter, which is the subject of the petitions before us, the legislator gave especially broad regulatory powers to the agricultural boards. The boards were authorized to regulate the production, marketing and export of the agricultural sectors, including the determination of quotas, levying charges on the farmers and marketers and taking enforcement measures against the farmers to comply with their rules. The boards carried out these functions by enacting rules in a wide range of areas. According to the legislation that preceded the Agriculture Chapter, the enactment of these rules was subject to the authority of the boards, some requiring the approval of the relevant ministers — the Minister of Agriculture and Village Development (hereafter — the Minister of Agriculture or the minister) and in some matters also the Minister of Trade and Industry (hereafter, jointly — the ministers). The boards were composed of government representatives and public representatives that included, *inter alia*, representatives of farmers, producers of plant products, marketers and consumers. The farmers' representatives constituted at least a half of all the members of the boards and were appointed by the aforesaid ministers from lists submitted to them by organizations that were, in the opinion of the ministers, the representative organizations of the farmers. The legislation that preceded the Agriculture Chapter therefore gave the farmers and their organizations a dominant status in the activity and management of the boards, and this legislation gave the boards an extensive range of powers. This position gave the farmers in the various agricultural sectors broad autonomy in the management and regulation of their agricultural sectors. As shall be seen below, the Agriculture Chapter of the Economic Recovery Programme Law

significantly reduced this autonomy by increasing the power of the Minister of Agriculture to regulate the agricultural sectors, and this is mainly the subject of the petitioners' complaint in their petitions.

2. On 29 May 2003 the Knesset passed the Economic Recovery Programme Law, after a very rushed legislative process, of which details will be given below, and the Agriculture Chapter included in the aforesaid law. This chapter concerns wide-ranging structural reforms to the agricultural boards mentioned above. The Agricultural Chapter provides, *inter alia*, that the Fruit Board, the Vegetable Board, the Ornamental Plant Board and the Citrus Fruit Marketing Board (hereafter — the plant boards) would be consolidated as of 1 January 2004 into one board that would be called the 'Plant Board.' To this end, the Agricultural Chapter repealed the Vegetable Production and Marketing Board Law, 5719-1959, the Citrus Fruit Supervision Ordinance, 1940, the Citrus Fruit Marketing Ordinance, 1947, the Citrus Fruit (Supervision and Marketing) Ordinance, 5708-1948, and the Ornamental Plant (Production and Marketing) Board Law, 5736-1976, and it provided for changes and adjustments in the Fruit Board Law in order to change it into the 'Plant Board Law,' which applies to the vegetable sector, the fruit sector, the citrus fruit sector and the ornamental plant sector.

The Agricultural Chapter also regulated the mechanisms for the activity and powers of the Plant Board. The arrangements created by this chapter are different from the arrangements that prevailed with regard to the various agricultural boards in several ways: first, the chapter provides for a significant change in the scope of the board's powers, which mainly involves the transfer of most of the regulatory powers that were exercised by the various agricultural boards to the Minister of Agriculture. According to the new arrangement, the powers for determining charges and rules, which were exercised by the boards, have been transferred to the minister, while the board retains the power to advise the minister or to express its opinion before rules are made or charges are levied. Similarly, the chapter made changes to the manner of appointing the various representatives on the boards, including the manner of electing the farmers' representatives on the board and the appointment of members to the board's sector committees. According to the new arrangement, the farmers' representatives on the board are no longer appointed by the ministers from the lists of the organizations that are, in the opinion of the ministers, the representative organizations. Instead, they are chosen by all the farmers in general and secret elections. The methods of choosing members of the sector committees was left by the Agricultural

Chapter to the minister, to be determined in regulations, but according to what is stated in the State's response to these petitions, it is the minister's intention to provide that the farmers' representatives on the sector committees will also be chosen in general and secret elections.

The Agricultural Chapter also contains detailed transition provisions with regard to the consolidation of the aforesaid plant boards and with regard to the transfer of the regulatory powers to the minister. *Inter alia*, it provides that on the date on which the law came into effect (1 January 2004) the Vegetable Board, the Fruit Board, the Citrus Fruit Marketing Board and the Ornamental Plant Board shall stop their operations, and their assets shall become the property of the consolidated board. It also provides that until the initial members of the consolidated board are appointed, temporary administrations shall be established instead of each of the plant boards, and after the consolidation of the boards one consolidated administration shall be established. It also provides that the Minister of Agriculture shall appoint the members of the temporary administrations.

Unlike the other agricultural boards, the Poultry Board was not cancelled in the Agricultural Chapter nor was it consolidated with other boards. But under s. 56 of the law, which, as aforesaid, is also found in the Agricultural Chapter, similar changes to those set out above were made to this board with regard to the transfer of most of the regulatory powers of the board to the minister, and with regard to the manner of appointing the various representatives on the board, by means of an amendment to the Poultry (Production and Marketing) Board Law, 5724-1963 (hereafter — the Poultry Board Law). Transition provisions were also provided for this board, and these are similar to what was described above with regard to the appointment of a temporary administration by the Minister of Agriculture.

The Agricultural Chapter therefore brought about wide-ranging structural changes to the agricultural boards. These were, essentially, the consolidation of the plant boards into one board, the transfer of the main regulatory powers from the boards to the minister and also a change in the method of choosing the farmers' representatives on the boards.

The claims of the parties

3. The petitioners in the various petitions oppose the changes described above, and they raise a long list of claims against the constitutionality of the Economic Recovery Programme Law and the Agricultural Chapter included in it. The diverse claims of the petitioners — which touched upon the 'Boston

Tea Party' and even the reforms of Augustus to the office of the tribunes in Rome — can be classified into two main categories: claims concerning the ways in which the law was enacted and claims relating to the content of the law. With regard to the way in which the law was enacted, the petitioners complain that such substantial and wide-ranging changes to arrangements that existed for decades were made by means of emergency economic legislation and with the rushed legislative process that is characteristic of this legislation. With regard to the law itself, they claim that the reforms made by the Agricultural Chapter to the agricultural boards violate property rights, freedom of occupation, the right of representation, the freedom of association, equality and human dignity.

In reply, the respondents claim that there was no formal defect in the legislative process of the law under discussion, and that even if there were some defects in the law's legislative process these are insufficient to lead to declaring the law void. With regard to the petitioners' claims concerning the content of the law, the respondents claim that the law does not violate constitutional basic rights, and even if it is found that there is such a violation, it satisfies the tests of the limitation clauses in the Basic Laws.

Let us therefore examine the claims of the petitions in order.

The claims against the legislative process of the Agricultural Chapter

4. The petitioners complain, as aforesaid, that the reforms to the agricultural boards were made by means of the Economic Recovery Programme Law. The petitioners' claim is that the broad scope of the law under discussion and the rushed process of enacting it did not allow thorough and serious discussion of all the reforms that this law made to the agricultural boards. They further claim that there was no basis for including the Agricultural Chapter in the Economic Recovery Programme Law, since this chapter makes substantial and wide-ranging changes to arrangements that existed for decades, because the connection between the reform of the agricultural boards and the budget is, as they claim, remote and marginal, and because there was no urgent economic need to carry out this reform within the framework of emergency economic legislation.

In order to substantiate their claim that the legislative process that was chosen did not allow thorough and serious discussion of the reforms to the agricultural boards, the petitioners describe in great detail the rushed process of enacting the Agricultural Chapter, beginning with the government decision which was the basis for drafting the law under discussion until its enactment in

the second and third readings. From their detailed description of the events, we obtain a picture of an improper process in the government and the Knesset. Suffice it to say that from this description it transpires, *inter alia*, that the draft law, which contained a broad spectrum of issues that extend to approximately 170 pages, was tabled in the Knesset only on the date of its first reading (contrary to the rule set out in s. 113(c) of the Knesset Procedure Rules (hereafter — the Knesset Rules)); that the deliberations on the draft law prior to the second reading was held in its entirety by the Finance Committee instead of splitting the deliberations between the Knesset committees responsible for the various matters in the law (contrary to the rule set out in s. 13 of the Knesset Rules); that the Finance Committee devoted less than one full session to the deliberations on the Agricultural Chapter; that the vote on all the sections of the law at the Finance Committee was carried out within the framework of one marathon session from 11:00 a.m. until 6:30 the next morning. We should also point out that the second reading was also held on the day that the draft law was tabled in the Knesset (contrary to the rule set out in s. 125 of the Knesset Rules), and also that the voting on all the sections of the law and the reservations in the second reading until the law was passed on the third reading was held without interruption from the afternoon of 28 May 2003 until the early hours of the next morning. The whole legislative process, from the tabling of the draft law in the Knesset for the first reading until the law was enacted on the third reading, took approximately a month.

By way of comparison, the petitioners give details of the proceeding for enacting the agricultural board laws that the Agricultural Chapter cancelled or amended. Thus, for example, the petitioners in HCJ 4899/03 point out that the preparation of the Fruit Board Law took five years: the Ministry of Agriculture spent two years until the draft law was submitted for a first reading in 1970, the Economic Committee then held 32 meetings on the issue and finally the law was passed on its second and third readings in 1973. The petitioners in HCJ 4885/03 also point out that within the framework of the proceeding that enacted the Poultry Board Law in the beginning of the 1960s, the Economic Committee discussed the law for almost two years and finally returned the law to the Knesset with 47 reservations, which reflected, so it is claimed, the complexity of the issue and the variety of opinions about the law in the committee, the Knesset as a whole and the Israeli public. The petitioners therefore raise the question as to how is it possible to cancel, with a wave of the hand and a rushed process, arrangements that were formulated after lengthy and thorough discussion and that were in operation for decades.

In order to prove their claim that there was no justification for including the reforms to the agricultural boards within the framework of the rushed legislative process of the Economic Recovery Programme Law, and that the Agricultural Chapter ought to have been considered within the framework of an ordinary legislative process and in the Economic Committee, the petitioners refer to the remarks of the Knesset's legal advisor, Advocate Anna Schneider, during the discussion of the Finance Committee on the Agricultural Chapter in the law:

> 'My position is that according to the Knesset Rules, the matter [of the agricultural boards] should be considered by the Economic Committee. My position is also consistent — I try in general, with regard to Arrangements laws, to examine what is inherently connected with an economic programme or budget, and what can be deferred and discussed in a more leisurely fashion. I already said during the discussions of the Finance Committee — this chapter, from my point of view, should be considered by the Economic Committee, and it can be considered separately from all the matters that are being considered here now' (p. 10 of the minutes of the meeting of the Finance Committee on 14 May 2003).

A similar position was expressed by the Knesset's legal adviser at the meeting of the Finance Committee on 22 May 2003, at which the committee voted on the Agricultural Chapter:

> 'I have recommended all along, and also in the Arrangements Law, that this chapter should not be included within the framework of the economic recovery programme. I recommended also that this matter should be considered by the Economic Committee, but the decision in these matters is not made by legal advisers but by you, the members of the Knesset' (*ibid*., at p. 25).

The petitioners therefore claim that there was no basis for including the reforms made by the Agricultural Chapter to the agricultural boards within the framework of the Economic Recovery Programme Law, and that this rushed legislative process did not allow a thorough and serious discussion of all these reforms. Therefore they claim that this was an invalid legislative process which, according to them, should lead to a declaration that the Agricultural Chapter is void.

5. By contrast, counsel for the respondents argues that there was no formal defect in the legislative process, and that all the departures from the ordinary legislative process were made in accordance with decisions of the Knesset Committee, which is authorized under the Knesset Rules to order a departure from the ordinary rules (see ss. 113(c), 117(a) and 125 of the Knesset Procedure Rules). Therefore she argues that the draft law passed all the legislative processes required — first reading, deliberations in committee and second and third readings — while complying with all the formal requirements set out in the relevant sections of the Knesset Rules.

Counsel for the respondents said in her reply that the position of the Attorney-General, as well as the position of the Knesset's legal advisor, was and is that there is no basis for excessive use of rushed legislative processes within the framework of the arrangement laws or similar laws, which include many different subjects in one package. According to them, legislative amendments that are ancillary to the budget law and that are discussed as one package should not be an impossibility, but this should only be done when there is a direct and essential link between the budget items and the proposed legislative amendment, and when the amendments are not intended to make structural reforms or they do not change basic principles in legislation. Notwithstanding, counsel for the respondents argues that the fact that the members of the Knesset did not accept this position and the recommendations of the Knesset's legal advisor in the legislative process under discussion in these petitions is insufficient to lead to the law being void. Her opinion is that when there is no formal defect in the legislative process that goes to the heart of the matter, and when the legislative process was carried out in accordance with the powers given to the Knesset and its committees in the Knesset Procedure Rules, the mere fact that 'excessive' or 'improper' use was made of arrangement laws cannot lead to the law being void.

Use of the legislative mechanism of Arrangements Laws

6. The law under discussion belongs, as its characteristics show, to the 'State Economy Arrangements Law Family.' As we will see below, laws in this 'family' have several characteristics that pertain to their structure and the way in which they are enacted, and these distinguish them from most laws that are enacted in the Knesset by means of the ordinary legislative process. Let us therefore consider the main arguments against the use of the mechanism of Arrangements Law legislation, and afterwards we will consider the petitioners' arguments against the use made of this mechanism in this case.

7. The first Arrangements Law (the Emergency State Economy Arrangements Law, 5746-1985) was enacted in 1985 as a supplementary step to the economic emergency programme for stabilizing the economy, when the serious state of the Israeli economy necessitated an emergency economic programme. Indeed, in the purpose clause of the first Arrangements Law, it was stated that 'this law provides arrangements for the emergency in which the State economy finds itself…' (s. 1 of the aforesaid law), but since then the law that was conceived as an emergency law has become an accepted practice that is brought before the Knesset for ratification each year, in conjunction with the Budget Law, sometimes under the name of 'Arrangements Law' and sometimes under other names (see the State Comptroller, *Annual Report 53B for 2002 and Accounts of the 2001 Fiscal Year* (hereafter — the State Comptroller's Report), at p. 30).

Laws of the Arrangements Laws type are characterized by their being comprised of a variety of issues, and they serve as a 'catch-all device' for enacting legislation and legislative amendments in many different areas. These laws are also characterized by rushed and unusual legislative processes. Thus, for example, the initiative for enacting these laws comes from the Ministry of Finance, unlike ordinary government draft laws where the initiative for the legislation usually comes from the minister who is responsible for the subject to which the legislation refers or from the Ministry of Justice. The discussion in the government and the Knesset is usually held on all of the matters included in the draft law as one package and in a very rushed process; the draft law is usually referred in full for deliberations in the Finance Committee instead of splitting it up among the other Knesset committees that are responsible for each matter. Over the years, the use of the legislative mechanism of Arrangements Laws has grown, and there have even been 'Arrangements Laws' that were enacted independently of the State budget, as a part of the government's economic programme. The Arrangements Law and laws similar to it, such as the Economic Recovery Programme Law which is the subject of the petitions before us, have become massive pieces of legislation, which deal with an ever-growing number of issues from a wide variety of fields, and even issues that have no direct and essential connection with the budget. Moreover, over the years the use of Arrangements Laws has increased not only for legislative amendments required in order to bring existing legislation into line with the Budget Law, but as a 'platform' for legislation and legislative amendments that are sometimes substantial and wide-ranging, and as a means of making structural changes to the economy

and society, including on matters that are the subject of dispute, which the government would have difficulty in passing in an ordinary legislative process.

8. Use of the legislative mechanism of the Arrangements Law and similar laws (such as the law which is the subject of the petitions before us) raises considerable problems from the viewpoint of proper democratic process. Many of the problems that this legislative mechanism raises derive from the fact that it is characterized by a variety of issues that are included in it as one package, the large number of issues and the short period of time that the government and the Knesset are given to discuss these issues. This fact sometimes impairs the decision-making process, either in the stages of drafting the law or in the Knesset's deliberations. This was discussed by the State Comptroller, who examined the process of drafting Arrangements Laws in recent years from the moment when draft decisions are prepared in the Budgets Department until they are submitted for government approval. *Inter alia* the State Comptroller said that:

> '… The large number of issues and the short time between the distribution of draft decisions to the ministries and the date of the government deliberations makes it difficult to have a thorough, professional, detailed and fruitful discussion of each proposal, before the date of the government deliberations. This, in practice, prevents any presentation of professional and substantive positions that ought to be considered by the parties making the decisions' (State Comptroller's Report, at p. 37; see also *ibid*., at pp. 30-44).

As can be seen from letters that the petitioners attached as appendices to the petitions, the Attorney-General also warned of these problems again and again in letters that were sent to the ministers of finance in the various governments before bringing the legislative initiatives to the government for discussion, and in addition to the warnings and entreaties of the Attorney-General to the ministers of finance, the legal advisor of the Knesset wrote in a similar vein to members of the Knesset.

There is no doubt that the State Comptroller, the Attorney-General and the Knesset's legal advisor are correct in their criticism of this rushed legislative mechanism. Indeed, we are speaking of a legislative process that makes it very difficult to hold thorough and comprehensive discussions and that impairs the ability of the decision-makers in the government and the Knesset to form a considered opinion with regard to each of the issues that appear in the draft law. We should remember that one of the purposes that underlie the provisions

of the Knesset Procedure Rules with regard to legislative processes is to allow members of the Knesset to decide their position carefully on each item of legislation that comes before them (see also HCJ 410/91 *Bloom v. Knesset Speaker* [1], at p. 207, according to which the logic underlying s. 125 of the Knesset Procedure Rules is to allow '… more thorough examination and clarification of draft laws that are tabled in the Knesset'), and it is difficult to see how the legislative mechanism that characterizes Arrangements Laws is consistent with this purpose.

Moreover, a rushed legislative process that does not allow a proper discussion of the draft law may also impair the end product of the legislative process. Because of this fear, the Knesset Commissioner for Future Generations, Justice (ret.) Shlomo Shoham, in a letter to the prime minister, the Knesset Speaker and the chairman of the Knesset Committee dated November 2003, also sought to issue a warning:

> 'The political position today is that most major draft laws initiated by the government undergo a rushed legislation process, are considered under impossible pressure of time and may lead to serious consequences both to the Knesset and to the State of Israel…
>
> Rushed legislation that the Knesset cannot consider properly, within the framework of the professional committees and with considered and balanced discretion, may lead to damage that is greater than its benefit even if the underlying intention was correct… experience shows that sometimes a reform that was basically positive… causes very great damage because of negligence or an error in details on which it relied.'

9. Furthermore, we are concerned with a legislative process that makes it difficult for the public, government ministers and particularly the Knesset itself and its committees to carry out effective supervision and scrutiny of the legislative process. This legislative process is not characterized only by the fact that many different subjects are discussed within its framework as one package and within a short time. This abbreviated legislative process is also characterized by the fact that the draft law as a whole is usually referred for discussion to the Finance Committee, which acts in a blatantly coalitional manner, instead of splitting it up among the other Knesset committees that have responsibility for, and expertise in, the respective subjects. The Arrangements Law is also characterized by the fact that it usually

accompanies the Budget Law, and so party discipline is guaranteed for its passage (and when the draft law does not accompany budget discussions, as happened in the case before us, the government announces that it regards the vote on the law as a vote of confidence, and it thereby guarantees party discipline). Indeed, the Arrangements Law has become '… a special tool of the government that assists the government in speeding up the legislative process, overcoming parliamentary obstacles, initiating and perfecting acts of legislative without thorough deliberations, proper supervision and scrutiny, and in reliance on the coalition's majority' (see D. Nahmias & E. Klein, *The Arrangements Law: Between Economics and Politics*, Israel Democracy Institute, Position Paper 17, 2000, at p. 7). The Knesset Commissioner for Future Generations used stronger language in his letter cited above:

> 'Combining the Arrangements Law with the Budget Law makes it possible, once a year, to force the will of the government on the Knesset in a rushed and hurried proceeding that does not respect the Knesset, does not allow objective discussion and *de facto* makes a mockery of fundamental provisions of the Knesset Procedure Rules — the provisions that determine the subjects discussed in each of the Knesset Committees…
>
> The Knesset is gradually losing not only its power and independence as the legislature but also its ability as a supervisory authority over the actions of the government… thus the delicate balance between the powers is also disrupted.'

Indeed, this legislative mechanism, which is used by the government as a device for 'overcoming parliamentary obstacles' (in other words, preventing effective parliamentary scrutiny of the government's legislative initiatives), may harm the proper balance, according to the principle of the separation of powers, between the executive and the legislature in the legislative process. A real parliamentary democracy requires legislation to be enacted, in theory and in practice, in the legislature and by the legislature.

10. The approach according to which the fundamental decisions and norms that bind citizens should be adopted both formally and substantively by the legislature and not by the executive is not merely based on the principle of the separation of powers but it derives from the very concept of democracy and from the representative democracy practised in Israel. Indeed, in HCJ 3267/97 *Rubinstein v. Minister of Defence* [2] President Barak discussed how:

> '… Democracy means the rule of the people. In a representative democracy, the people chose their representatives, who operate within the framework of parliament… The major decision with regard to the policy of the State and the needs of society must be made by the elected representatives of the people. This body is elected by the people to enact its laws, and it therefore enjoys social legitimacy in this activity… Indeed, one of the aspects of democracy is the outlook that fundamental and major decisions affecting the lives of citizens should be made by the body that has been elected by the people to make these decisions' (*ibid*., at p. 508 {173}).

These remarks were made with regard to the demand that primary arrangements are made in statute, but in that case President Barak emphasized that:

> 'This approach, which seeks to protect the standing of the Knesset and the standing of the democratic principle of representation that underlies it, is not merely restricted to the demand that primary arrangements are determined in statute. This desire to protect the elevated standing of the Knesset has general application. "… We are under a permanent obligation to be very punctilious in this regard so that the authority of the Knesset is not encroached upon and that the fundamentals of democracy are upheld"…' (*ibid.*, at p. 511 {176-177}).

11. Notwithstanding the considerable criticism that has been levelled against the legislative mechanism of the Arrangements Law, the use of the Arrangements Law and similar laws has become ensconced in Israel and has even increased over the years. It appears that one of the main reasons for this is that the government and the Ministry of Finance tend to regard it as an effective and quick mechanism for promoting legislation that reflects the policy of the government, and it is possible that this mechanism is also regarded by them as a 'necessary evil' for the effective management of the State budget and for furthering the government's economic policy. Indeed, the main claim of those who support the use of the Arrangements Law is that in view of the economic and political reality in Israel, this is the most effective means, and sometimes the only means, of furthering government policy and introducing structural and economic reforms, and it is doubtful whether some of them would have been approved by means of the ordinary legislative

processes that are customary in the Knesset. Therefore there are some who argue that the government should be allowed to keep this executive-legislative tool, which allows it to realize its objectives, to influence national priorities within a relatively short time and also to make technical amendments to legislation, and that the Arrangements Law has proved itself as an effective tool for this purpose (for the reasons of those who support this legislative mechanism, see Nahmias and Klein, *The Arrangements Law: Between Economics and Politics*, *supra*, at pp. 13-18).

12. I think that the arguments in favour of the effectiveness of the legislative mechanism of the Arrangements Law cannot stand against the importance of the principle of the separation of powers and the principles of representative democracy. Indeed, 'the separation of powers… was not intended to ensure effectiveness. The purpose of the separation of powers is to increase liberty and prevent a concentration of power in the hands of one sovereign authority in a manner liable to harm the liberty of the individual' (*Rubinstein v. Minister of Defence* [2], at p. 512 {179}). Therefore, in view of the great difficulties involved in this legislative mechanism, it would appear that it should be used, if at all, intelligently and sparingly (see, in this regard, the approach of Nahmias and Klein, *The Arrangements Law: Between Economics and Politics*, *supra*, at pp. 47-57, who recommend that use of this mechanism should be stopped or at least restricted; see also the recommendation of the State Comptroller in this regard — the State Comptroller's Report, at pp. 41-44).

13. Now that we have addressed the basic criticism of using the legislative mechanism of the Arrangements Law, we should examine whether in the existing legal position there are grounds for declaring a law, or a section enacted within the framework of the Arrangements Law, to be void, because of the legislative process that characterizes this law. Thus, for example, should we accept the argument that the petitioners have made in the petitions before us that a certain section or a certain chapter in the Arrangements Law is void because it was enacted by means of a rushed and unusual legislative process of the kind used for the Arrangements Law?

In order to answer this question that has been brought before us, let us first consider the normative framework that regulates the legislative processes of the Knesset, by virtue of which it enacts the Arrangements Law, and afterwards let us examine the scope of judicial review with regard to the legislative processes of the Knesset.

The normative framework

14. The legislative processes of the Knesset are not currently regulated in Basic Laws or in statute, but in the Knesset Procedure Rules. The power to regulate the work procedures of the Knesset in rules was provided in s. 19 of the Basic Law: the Knesset, which says:

'Work procedures and rules

> 19. The Knesset shall determine its work procedures; to the extent that the work procedures are not determined in statute, the Knesset shall determine them in rules; as long as the work procedures have not been determined as aforesaid, the Knesset shall act in accordance with its accepted practice and procedure.'

(See also: HCJ 742/84 *Kahana v. Knesset Speaker* [3], at p. 90; HCJ 669/85 *Kahana v. Knesset Speaker* [4], at p. 398; Z. Inbar, 'Legislative Processes in the Knesset,' 1 *HaMishpat* 91 (1993), at pp. 91-92. See also: s. 25 of the Basic Law: the Knesset). The relevant provisions for the process of enacting the Arrangements Law are the provisions found in chapter seven of the Rules, which provides the rules of procedure for draft laws proposed by the government. It should be said that s. 131 of the Rules admittedly provides that 'In deliberations on the State budget, and in other exceptional cases, the Knesset Committee may determine special procedures for the deliberations,' but the Knesset Committee has not determined any special procedures for deliberations in the case before us, and therefore the enactment of the Arrangements Law is subject to the same rules that apply to government draft laws (with the exception of a difference provided in s. 128(b)(2) of the Rules that is irrelevant to our case).

The legislative process of a government draft law involves several main stages: the tabling of the draft law in the Knesset, first reading in the Knesset, deliberations in one of the Knesset committees, and subsequent tabling in the Knesset for a second and third reading. With regard to the timetable for carrying out the various stages in the legislative process, the Rules contain a relatively small number of provisions concerning minimum periods that limit the speed of the legislative process, and even these may be bypassed by virtue of a decision of the Knesset Committee (see, for example, ss. 113(c), 125, 129 and 130 of the Rules). With regard to the committee that will consider the draft law before the second and third readings, the Rules admittedly contain

provisions with regard to the jurisdictions of the committees (s. 13 of the Rules), but at the same time there is a provision that allows the Knesset Committee to determine the committee to which the draft law will be referred (s. 117(a) of the Rules). This provision is what allows the Knesset to hold deliberations on all of the issues in the draft Arrangements Law in the Finance Committee, instead of splitting it between the committees for the various subjects in accordance with the jurisdictions set out in s. 13 of the Rules (Inbar, 'Legislative Processes in the Knesset,' *supra*, at p. 100). In this respect, it should be noted that according to the prevailing legal arrangement, there is no formal legal restriction on the range or number of issues that can be included in one draft law. Likewise, there is currently no formal legal restriction on the types of issues that can be included within the framework of the Arrangements Law.

It can therefore be seen that the Knesset Procedure Rules allow the legislature a large degree of flexibility in the legislative process, while providing few restrictions on the speed of the legislative process and the identity of the committees that will consider the draft law, and even these may be bypassed in accordance with a decision of the Knesset Committee. Indeed, no one disputes that, subject to exceptional cases that require the approval of the Knesset Committee, the prevailing legal position is such that there is no formal restriction on the power of the Knesset to make use of a rushed legislative process, such as the Arrangements Law, within which framework many different subjects are treated as one package, and within which framework the draft law in its entirety is deliberated by the Finance Committee. Against this background, let us to turn to examine the scope of judicial review of the Knesset's legislative processes in general, and of the legislative process that characterizes the Arrangements Law in particular.

Scope of judicial review of the Knesset's legislative processes

15. The jurisdiction of this court to exercise judicial review of the Knesset's legislative processes was recognized in the case law of this court some years ago. The following was said in HCJ 761/86 *Miari v. Knesset Speaker* [5], *per* Justice Barak:

> 'Legislative processes are carried out by law, and the organs of the Knesset that are involved in legislation hold a public office by law. It follows that even legislative activity is subject to the power of judicial review exercised by the High Court of Justice' (*ibid*., at p. 873).

The court discussed the power of this court to declare a statute void because of defects that occurred in the legislative process in HCJ 975/89 *Nimrodi Land Development Ltd v. Knesset Speaker* [6], at p. 157:

> '*The legislative process, like any other executive proceeding, is a "normative" proceeding, i.e., a proceeding whose stages are regulated by law*. According to the Basic Law: the Knesset (s. 19), the legislative processes are set out in the Knesset Procedure Rules. In order that a "law" may be passed, the provisions of the Rules concerning legislative processes must be followed. The fundamentals of these processes — in so far as a draft law initiated by the government is concerned — are three readings in the Knesset, and deliberations in a committee (after the first reading and in preparation for the second reading). *If one of these stages is missing*, such as one of the readings was not held or a majority was not obtained in them or there were no deliberations in committee *or if there was a defect in one of the proceedings that goes to the heart of the process, the draft does not become legislation, and the court is authorized — whether as a result of a direct attack or an indirect attack* (see *Miari v. Knesset Speaker* [5]) — *to declare the "statute" void*' (emphases supplied).

The various organs of the Knesset are therefore subject to the judicial review of the High Court of Justice even when they are engaged in legislation. Moreover, none of the respondents before us disputed that in order to pass a statute, the provisions of the Rules concerning the legislative process must be observed, and that if there was a defect in the legislative process that goes to the heart of the process, this court has, in principle, the power to declare the statute to be void. The question in this case concerns the scope of the judicial review of the legislative process and the grounds for the intervention of this court in the legislative process. The question is whether there is a ground for the intervention of this court when the legislative process has been carried out in accordance with the powers given to the Knesset and its committees in the Knesset Procedure Rules, and when there was no formal defect in the legislative process.

16. This court has often emphasized that it will act with self-restraint and caution in so far as the judicial review of parliamentary proceedings are concerned, and even more so when the proceeding in which the intervention is

sought is the legislative process itself. Indeed, '… as a witness to the complex relationship between the main three powers — the Knesset, the government and the court — the court has created and built around itself reservations, restraints and constraints, when it is asked to exercise a power of review over the Knesset and its organs' (*per* Justice M. Cheshin in HCJ 971/99 *Movement for Quality Government in Israel v. Knesset Committee* [7], at p. 140, and see also HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [8], at pp. 810-815). On the self-restraint required in judicial review of the legislative process, Justice Barak said in *Miari v. Knesset Speaker* [5], at p. 873:

> 'The High Court of Justice is not obliged to exercise every power that it is given. The court has discretion in exercising the power. Use of this discretion is especially important in so far as judicial review of acts of organs of the legislature is concerned. We will therefore intervene in internal parliamentary proceedings only when there is an allegation of a substantial violation, which involves a violation of fundamental values of our constitutional system… this self-restraint should find its greatest expression when the proceedings in which the intervention is sought is the legislative process itself.'

This was also held *per* Justice Or in HCJ 8238/96 *Abu Arar v. Minister of Interior* [9], at p. 35:

> 'The question of the power of this court to declare a law to be void, on account of defects that occurred (if at all) in the legislative process provided in the Knesset Procedure Rules, is not a simple question. Hitherto, there is no precedent for such intervention, even though in principle the power of the court to do this has been recognized (*per* Justice Barak in *Nimrodi Land Development Ltd v. Knesset Speaker* [6], at p. 157). In my opinion, we ought to adopt a fundamental approach on this question, which gives the proper weight to the status of the Knesset as the legislature of the State. In considering these claims, the court should proceed from case to case with appropriate caution, and consider making a declaration that a statute is void on the basis of a defect in a legislative process as aforesaid only in rare cases of a defect that goes to the heart of the matter.'

(See also MApp 166/84 *Central Tomechei Temimim Yeshivah v. State of Israel* [10], at p. 276; HCJ 7138/03 *Yanoh-Jat Local Council v. Minister of Interior* [11], at p. 714; HCJ 5160/99 *Movement for Quality Government in Israel v. Constitution, Law and Justice Committee* [12], at p. 95).

In exercising judicial review of the legislative processes of the Knesset, the court will be mindful of the principle of the separation of powers and give proper weight to the elevated status of the Knesset as the legislature of the State, '… which was elected democratically and reflects the free will of the people…' (*per* Justice Berinson in HCJ 108/70 *Manor v. Minister of Finance* [13], at p. 445). Therefore in subjecting the legislative processes of the Knesset to its review, the court will act with caution and restraint, and it will not lightly declare a statute to be void because of a defect that occurred in the process that brought about its enactment.

Notwithstanding, nothing in the aforesaid leads to the conclusion that judicial review of the legislative processes is limited to defects of *ultra vires* or only formal defects in the legislative process, as counsel for the respondents argues. In *Nimrodi Land Development Ltd v. Knesset Speaker* [6] and *Abu Arar v. Minister of Interior* [9] it was held that the test for the intervention of this court in the legislative process is whether the defect that occurred in the legislative process is a 'defect that goes to the heart of the process.' What is a 'defect that goes to the heart of the process' is not decided in accordance with the classification of the defect as a defect of *ultra vires* or as a formal violation of a certain section in the Knesset Procedure Rules, but in accordance with the strength of the violation that this defect causes to 'major values of our constitutional system' or to basic values of our constitutional system that underlie the legislative process (see the remarks of Justice Barak in *Miari v. Knesset Speaker* [5], at p. 873, and see also the remarks of Vice-President Or in *Yanoh-Jat Local Council v. Minister of Interior* [11], at p. 714; see also HCJ 5131/03 *Litzman v. Knesset Speaker* [14], at pp. 586-587 {**Error! Bookmark not defined.-Error! Bookmark not defined.**}). The judicial self-control and restraint required in the review of legislative processes will not be assured by means of technical and formal measures, but by means of the interpretation given to the concept of 'a defect that goes to the heart of the process,' which restricts it only to serious and rare defects that involve a severe and substantial violation of the basic principles of the legislative process in our parliamentary and constitutional system (see also: S. Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' 19 *Mechkarei Mishpat* (2003) 720, at pp. 784-

785). It has already been held, with regard to the scope of the intervention of this court in legislative processes, that 'the tendency is not to intervene in these proceedings except in cases where the violation of basic values and principles in our constitutional law is a violation of a serious and substantial nature' (*per* Vice-President Or in *Yanoh-Jat Local Council v. Minister of Interior* [11], at p. 714).

Therefore, not every formal defect in the legislative process, not every breach of the Knesset Procedure Rules, and not even every case of *ultra vires* will lead to the intervention of this court in the legislative process. Thus even the fact that we are concerned with a rushed legislative process of the Arrangements Law type is, in itself, insufficient to lead to the conclusion that there is a basis for judicial intervention in the legislative process (see also *Bloom v. Knesset Speaker* [1], at p. 207, where it was held that the use of a rushed legislative process in itself is insufficient to lead to a declaration that a statute is void). On the other hand, the fact that the Knesset is authorized to follow a legislative process of the Arrangements Law type is not sufficient to lead to the conclusion that there is never any basis for judicial intervention in the legislative process. So we see that whether we are concerned with a formal defect or a defect that does not involve a formal violation of the Knesset Procedure Rules, whether we are concerned with a legislative process of the Arrangements Law type or an ordinary legislative process, the court should examine each case on the merits as to whether a 'defect that goes to the heart of the process' occurred in the legislative process, such that judicial intervention is warranted, and only a defect that involves a *severe and substantial* violation of the basic principles of the legislative process in our parliamentary and constitutional system will justify judicial intervention in the legislative process.

17. Before we consider the question of what are the basic principles of the legislative process in our parliamentary and constitutional system, such that a severe and substantial violation thereof will constitute a 'defect that goes to the heart of the process,' let us emphasize that even in those rare cases where the court reaches the conclusion that a defect that goes to the heart of the process occurred in the legislative process, this does not necessarily lead to the absolute voidance of the statute. In this regard, a distinction should be made between the question whether a 'defect that goes to the heart of the process' occurred in the legislative process of a statute and the question of the nature of the consequence arising from the existence of a defect of this kind in the legislative process. The answer to this latter question will be determined in

accordance with the model of relative voidance (see *Litzman v. Knesset Speaker* [14], at p. 590 {**Error! Bookmark not defined.-Error! Bookmark not defined.**}, and see also and cf. A. Barak, *Legal Interpretation*, vol. 3, *Constitutional Interpretation* (1994), at pp. 724-725).

According to the model of relative voidance, within the framework of the decision concerning the result of a defect in the legislative process, we should take into account the nature of the defect that occurred in the legislation and all the circumstances of the case. With regard to the nature of the defect that occurred in the legislative process, we should examine in each case, in addition to the severity of the defect and the extent of its violation of the basic principles of the legislative process, also the question whether the statute would have been passed had it not been for the defect (see and cf. *Litzman v. Knesset Speaker* [14], at pp. 590, 592 {**Error! Bookmark not defined.-Error! Bookmark not defined.**}; I. Zamir, *Administrative Authority* (1996), vol. 2, at pp. 679-680; Barak, *Constitutional Interpretation*, *supra*, at p. 724). Within the framework of the circumstances of the case, we should take into account the degree of reliance on the legislation, the extent of the reasonable expectations that it created and the consequences that will arise from declaring it void (Barak, *Constitutional Interpretation*, *supra*, *ibid.*). We should also take into account the fact that, unlike a statute that is declared void on account of its unconstitutional content, in the case of a statute that is declared void because of a defect in its legislative process, there is nothing to prevent the legislature from re-enacting exactly the same statue while taking care, this time, to enact it properly.

Basic principles of the legislative process

18. Now that we have determined that the condition for judicial intervention in the legislative process is a severe and substantial violation of a basic principle of the legislative process in our parliamentary and constitutional system, we must ask what are these basic principles. They are the basic principles derived from the principles of formal democracy and from the very existence of parliamentary democracy. They are the basic principles without which (and without the principles of substantive democracy) democracy would not exist in Israel. Among the basic principles of the legislative process in our parliamentary and constitutional system we can include the principle of majority rule; the principle of formal equality (according to which there is 'one vote for each Knesset member'); the

principle of publicity, the principle of participation (according to which each Knesset member has a right to participate in the legislative process).

In the case before us, no one claims that a legislative process of the Arrangements Law type violates the first three basic principles we mentioned — the principle of majority rule, the principle of formal equality and the principle of publicity, but because of their importance we will also discuss these principles briefly. Thereafter, we will discuss the principle of participation and examine whether a legislative process of the Arrangements Law type involves a violation of this principle, and whether the extent of the violation justifies judicial intervention in the legislative process.

19. The principle of *majority rule* is a basic principle that is a condition for the existence of any democracy — 'take away majority rule from the body of a political system and you know that you have taken away the soul of democracy. The principle of majority rule governs the Knesset itself, in the sense "for He that is higher than the high watches" (Ecclesiastes 5, 7)' (*per* Justice Cheshin in CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [15], at p. 546, and see also *ibid*., at pp. 536-537). This principle is also enshrined in s. 25 of the Basic Law: the Knesset, which provides:

> 'The Knesset shall decide by a majority of those participating in the vote, while those abstaining are not included among those participating in the vote; the voting arrangements shall be determined in rules; all of which when there is no other provision in statute in this regard.'

The principle of majority rule in the legislative process therefore applies to those rules that govern the manner of holding the votes, such as the requirement for an ordinary majority or a special majority and the rules governing the voting process (Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' *supra*, at p. 785, and see also *Litzman v. Knesset Speaker* [14], at pp. 588 {**Error! Bookmark not defined.**}). Indeed, for a law to pass, the draft law must obtain a majority in each of the three readings (in a government draft law), and the absence of this majority in one of the legislative stages is a defect that goes to the heart of the process, which will lead to a declaration that the law is void. This is the case with regard to a law that requires an ordinary majority to be passed (*Nimrodi Land Development Ltd v. Knesset Speaker* [6], at p. 157) and it is also the case with regard to a law that needs a special majority to be passed (HCJ 98/69 *Bergman v. Minister of Finance* [16]; HCJ 246/81 *Derech*

Eretz Association v. Broadcasting Authority [17]; HCJ 141/82 *Rubinstein v. Knesset Speaker* [18]).

20. The *principle of equality in the legislative process*, according to which there is 'one vote for each Knesset member,' is also an essential basic principle in every democratic legislature. Indeed, one of the constitutive attributes of the legislature is the principle of formal equality among its members:

> '...[A] legislature is a plural body. The equally elected and equally representative members are each other's formal equals... The elaborate decisional procedures within legislatures are designed to develop... a collective agreement. The collective judgment is best symbolized by roll call votes, in which each member has one vote just like every other member' (D.M. Olson, *Democratic Legislative Institutions: A Comparative View* (1994), at p. 5).

This principle was also discussed by the Constitutional Court in Germany:

> 'Alle Mitglieder des Bundestages haben dabei gleiche Rechte und Pflichten. Dies folgt vor allem daraus, daß die Repräsentation des Volkes sich im Parlament darstellt, daher nicht von einzelnen oder einer Gruppe von Abgeordneten, auch nicht von der parlamentarischen Mehrheit, sondern vom Parlament als Ganzem, d.h. in der Gesamtheit seiner Mitglieder als Repräsentanten, bewirkt wird.
>
> ...
>
> Aus dem vom Bundesverfassungsgericht im wesentlichen in seiner Rechtsprechung zum Wahlrecht entwickelten sogenannten formalisierten Gleichheitssatz folgt nichts anderes. Er besagt im vorliegenden Zusammenhang nur, daß alle Mitglieder des Bundestages einander formal gleichgestellt sind.'
>
> 'All representatives have equal rights and duties because parliament as a whole, not individuals or groups of legislators, represents the people. This assumes that each member participates equally in the legislative process.
>
> ...
>
> The principle of formal equality, which has been developed by the Constitutional Court in its jurisprudence dealing with the right to

> vote... requires... that all representatives be placed in a position of formal equality with respect to one another...' (BVerfGE 80, 188 [53], at pp. 218, 220, translated in D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (second edition, 1997), at pp. 175-176).

Indeed, the principle of formal equality is an essential basic principle in the legislative process (see and cf. *Litzman v. Knesset Speaker* [14], at pp. 588-590 {**Error! Bookmark not defined.-Error! Bookmark not defined.**}).This principle *de facto* is supplementary to the principle of majority rule and is derived from it, for what point is there to the principle of majority rule if the 'majority' is obtained by a legislative process in which the vote of Knesset members from one party on a draft law is worth two votes for each Knesset member, whereas the vote of Knesset members from another party is worth only half a vote for each Knesset member?

21. The *principle of publicity* is also a basic principle in the legislative process of democracies (Olson, *Democratic Legislative Institutions: A Comparative View*, at pp. 8-9). This principle is also enshrined in the Basic Law: the Knesset, which provides in s. 27 that 'The Knesset will sit in open session,' and in s. 28 that 'The proceedings in a session of the Knesset and the statements that are made thereat may be published freely without leading to criminal or civil liability.' The principle of publicity in the legislative process is intended to increase the transparency of the Knesset's work in the legislative process and thereby increase the accountability of Knesset members to the electorate. Making draft laws and the legislative process open to the public is also intended to allow the public to express its position with regard to the draft laws and to try to take a part in the legislative process by contacting its elected representatives. There are some who raise the question whether the status of the principle of publicity in the legislative process is as exalted as the other basic principles that we have mentioned. It may be assumed that the answer is yes, but this question does not need to be resolved in the case before us (see and cf. Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' *supra*, at p. 785, note 276; A. Vermeule, 'The Constitutional Law of Congressional Procedure,' 71 *U. Chi. L. Rev.* (2004) 361, at pp. 410-422).

22. The *principle of participation*, according to which each Knesset member has a right to participate in the legislative process, is also a basic principle in the legislative process of democracies. The principle of participation is merely a development of representative democracy and its

application in parliamentary law. Indeed, 'in a representative democracy, the people choose their representatives, who act within the framework of parliament…' (*Rubinstein v. Minister of Defence* [2], at p. 508 {173}; *Litzman v. Knesset Speaker* [14], at p. 588 {**Error! Bookmark not defined.**}; on the parliamentary system in Israel and the Israeli model of representative democracy, see C. Klein, 'On the Legal Definition of the Parliamentary System and Israeli Parliamentarianism,' 5 *Mishpatim* (1973) 308; S. Nevot, 'The Knesset Member as a "Public Trustee",' 31 *Mishpatim* (2000) 433, at pp. 446-486). 'The principle of democracy implies that the Knesset is the complete expression of our formal democracy. It is elected by the people… the Knesset is the representative of each and every one of us' (A. Barak, 'Parliament and the Supreme Court — A Look to the Future,' 45 *HaPraklit* (2000) 5, at p. 7). 'The Knesset is the elected house of the State' (s. 1 of the Basic Law: the Knesset), and it is the organ that '… reflects the free will of the people…' (*Manor v. Minister of Finance* [13], at p. 445). In doing so, the Knesset acts through the parties and through the Knesset members. Therefore, in order to enable the Knesset to carry out its functions by virtue of the principle of democratic representation, each Knesset member should be allowed to participate in the parliamentary proceedings that are required in order to carry out these functions.

Thus, for example, it was held that a party with only one Knesset member should not be denied the possibility of tabling a motion of no confidence, because this denial will harm the ability of the Knesset to carry out one of its main functions — supervision and scrutiny of the executive authority (HCJ 73/85 *Kach Faction v. Knesset Speaker* [19], at p. 164). In this regard, this court has said, in HCJ 7367/97 *Movement for Quality Government in Israel v. Attorney-General* [20], at p. 557, *per* Justice Dorner:

> 'Membership of the Knesset is not merely a title. Knesset members have a variety of functions, whose performance is a part of the essence of the office. The functions of Knesset members include, *inter alia*, expressing their positions and voting in the Knesset, initiating draft laws, raising parliamentary questions and tabling motions, serving on Knesset committees, and so forth.'

Indeed, in order to enable the Knesset to carry out its functions and Knesset members to carry out their functions, 'whose performance is a part of the essence of their office,' all Knesset members should be allowed to participate

in the parliamentary proceedings that are required in order to carry out these functions. Thus, *inter alia*, a Knesset member should not be denied '… the possibility of participating and voting in sessions of the Knesset…' (*Movement for Quality Government in Israel v. Attorney-General* [20], at p. 557). Notwithstanding the great restraint that this court imposes on itself in reviewing the acts of the Knesset, where a Knesset member is unlawfully denied the possibility of participating in parliamentary proceedings and carrying out his role as a Knesset member, judicial intervention is unavoidable (cf. in this respect the remarks of Justice Shamgar in HCJ 306/81 *Flatto-Sharon v. Knesset Committee* [21], at pp. 142-143).

The principle of participation is also recognized as a basic principle in other parliamentary democracies. Thus the Constitutional Court in Germany, for example, has recognized the principle of participation as a basic principle in the light of which parliamentary proceedings should be examined, and as a principle that constitutes a restriction on the power of parliament to determine its work arrangements:

> 'Richtmaß für die Ausgestaltung der Organisation und des Geschäftsgangs muß das Prinzip der Beteiligung aller Abgeordneten bleiben.
>
> ...
>
> Allgemein läßt sich sagen, daß das Parlament bei der Entscheidung darüber, welcher Regeln es zu seiner Selbstorganisation und zur Gewährleistung eines ordnungsgemäßen Geschäftsgangs bedarf, einen weiten Gestaltungsspielraum hat. Verfassungsgerichtlicher Kontrolle unterliegt jedoch, ob dabei das Prinzip der Beteiligung aller Abgeordneten an den Aufgaben des Parlaments gewahrt bleibt.'
>
> 'The proper standard against which parliamentary organization and procedure must be measured is the principle of universal participation.
>
> ...
>
> Generally, parliament has broad discretion in making rules pertaining to its organization and procedure. The principle of universal participation in parliamentary functions, however, acts as a constitutional check on this power' (BVerfGE 80, 188 [53], at pp. 218-219, translated in Kommers, *The Constitutional*

Jurisprudence of the Federal Republic of Germany, *supra*, at pp. 175-176).

In the same case, the Constitutional Court in Germany discussed the rationale underlying the principle of participation and the rights of members of parliament that are derived from this principle:

> 'Der Deutsche Bundestag ist unmittelbares Repräsentationsorgan des Volkes. Er besteht aus den als Vertretern des ganzen Volkes gewählten Abgeordneten, die insgesamt die Volksvertretung bilden... Die ihm von der Verfassung zugewiesenen Aufgaben und Befugnisse nimmt er jedoch nicht losgelöst von seinen Mitgliedern sondern in der Gesamtheit seiner Mitglieder wahr. Demgemäß ist jeder Abgeordnete berufen, an der Arbeit des Bundestages, seinen Verhandlungen und Entscheidungen, teilzunehmen. Dem Bundestag selbst obliegt es, in dem von der Verfassung vorgezeichneten Rahmen seine Arbeit und die Erledigung seiner Aufgaben auf der Grundlage des Prinzips der Beteiligung aller zu organisieren. Zu den sich so ergebenden Befugnissen des Abgeordneten rechnen vor allem das Rederecht und das Stimmrecht, die Beteiligung an der Ausübung des Frage- und Informationsrechts des Parlaments, das Recht, sich an den vom Parlament vorzunehmenden Wahlen zu beteiligen und parlamentarische Initiativen zu ergreifen, und schließlich das Recht, sich mit anderen Abgeordneten zu einer Fraktion zusammenzuschließen. Indem die Abgeordneten diese Befugnisse ausüben, wirken sie an der Erfüllung der Aufgaben des Bundestages im Bereich der Gesetzgebung, des Budgetrechts, des Kreations-, Informations- und Kontrollrechts und — nicht zuletzt — an der Erörterung anstehender Probleme in öffentlicher Debatte mit und genügen so den Pflichten ihres Amtes.'

> 'Parliament is the direct representative organ of the people, composed of elected representatives who represent the whole people... representatives exercise state authority that emanates from the people... The tasks and powers constitutionally assigned to parliament cannot be asserted independently of its members. *Thus each member is entitled to participate in all of parliament's activities. Parliament must organize its work in a manner consistent with the constitutional framework and based*

> *on the principle of universal participation. The rights of representatives include, above all, the right to speak, the right to vote, the right to ask questions and obtain information, the right to participate in parliamentary voting, and the right to unite with other representatives to form a political party*. By exercising these rights, representatives perform the tasks of legislation, shaping the budget, obtaining information, supervising the executive, and otherwise carrying out the duties of their offices' (BVerfGE 80, 188 [53], at pp. 217-218, translated in Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, *supra*, at pp. 174-175) (emphases supplied).

Thus, for example, P. Biglino Campos writes in her book on defects in the legislation process with regard to the principle of participation in Spanish law:

> 'Para que se pueda dar esta participación en la elaboración de la ley, varias normas intentan garantizar la información de los miembros de las Cámaras. El art. 69 del R.C.D. reconoce en general este derecho, al prohibir que comiencen debates sin la previa distribución, com cuarenta y ocho horas de antelación, del informe, dictamen o documentación que haya que servir de base al mismo... Por ser normas que están destinadas a garantizar la formación de la opinión propia de cada miembro de la Cámara...'
>
> 'In order to allow participation in the legislative process, various norms try to guarantee that information is made available to the members of the Houses. Article 69 of the R.C.D. recognizes this right in principle, when it prohibits the commencement of debates without the prior distribution, forty-eight hours in advance, of any information, report or documentation which may form the basis thereof… Because they are norms that are intended to ensure that each member of the House can form a proper opinion…'
>
> (P. Biglino Campos, *Los Vicios en el Procedimiento Legislativo*, 1991, at p. 81 (tr. by the editor); for Spanish parliamentary law and its relevance to Israeli law with regard to the parliamentary process in general, see Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' *supra*, at pp. 744-745, 764-767).

Indeed, the principle of participation is a basic principle in Western parliamentary democracies and this is also the case in the Israeli parliamentary democracy.

23. In the context of the legislative process, 'the principle of participation is what regulates the ability of every Knesset member, whether in the majority or the minority, to take a part in the democratic process of enacting law' (Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' *supra*, at p. 785). The essence of the right of a Knesset member 'to take part in the democratic process of enacting law' is the right to participate in voting on the draft law. The principle of participation, even in its narrowest sense, therefore gives each Knesset member the right to participate in each of the readings in the House and to vote thereat, except in those exceptional and extreme cases when he is denied this right by law. Indeed, the right of the Knesset member '… to take part and vote in sessions of the Knesset…' as stated in *Movement for Quality Government in Israel v. Attorney-General* [20], at p. 557, finds its greatest expression in the legislative process, since no one questions that one of the main functions of the Knesset as a whole, and of the members of the Knesset individually, is the enactment of laws (*Kahana v. Knesset Speaker* [3], at p. 89; Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' *supra*, at pp. 762, 780).

Moreover, like the principle of formal equality, the principle of participation in the legislative process is also an essential basic principle that *de facto* supplements the principle of majority rule, since what benefit is there in the principle of majority rule when the 'majority' is obtained by a legislative process in which participation was denied to those persons who opposed the law? Take, for example, an extreme case in which the Knesset Speaker, who has an interest in the enactment of a certain law, unlawfully removes from the House the Knesset members who oppose the draft law in order to ensure a 'majority' in one of the readings. It is clear that this proceeding is defective to an extent that will require the intervention of the court. Indeed, it would appear that even those who espouse the narrow and restricted version of judicial review of the legislative process will agree that 'a decision that is adopted by a group of Knesset members, without each Knesset member being given a proper and fair opportunity to participate in the voting, is not law' (A. Bendor, 'The Constitutional Status of the Knesset's Rules of Procedure,' 22 *Mishpatim* (1993) 571, at p. 583).

24. The principle of participation in the legislative process therefore requires a legislative process in which the Knesset members have a proper and fair opportunity to participate in the voting on the draft law, but is it sufficient to give them a physical possibility of being present at the vote in order to comply with the requirement of giving the Knesset members a proper and fair opportunity to participate in the voting? Take, for example, a case in which all the formal requirements of the legislative process are satisfied, but the draft law is written in a foreign language or in such a way that the Knesset members cannot know at all what is the subject of the vote, and they are given no possibility of discovering the nature of the legislation. It would appear that no one questions that this too is a defect that goes to the heart of the process, and it justifies judicial intervention. Such a defect makes the right of the Knesset members to take part in the voting meaningless, since of what use is the right to take part in the voting when the Knesset members are unable to know on what they are voting? In a judgment given recently, President Barak emphasized that the participation of the Knesset member in the legislative process is not limited merely to 'access to the proceedings of the House' or to participation in the deliberations and voting (*Litzman v. Knesset Speaker* [14], at pp. 588 {**Error! Bookmark not defined.**}). In that case it was held that the participation of the Knesset member in the legislative process also includes the '…practical opportunity of formulating his intentions' with regard to the draft law (*Litzman v. Knesset Speaker* [14], *ibid*.). It follows therefore that the principle of participation in the legislative process requires a legislative process in which the Knesset members are given a practical possibility of formulating their position on the draft law (see and cf. Biglino Campos, *Los Vicios en el Procedimiento Legislativo*, *supra*, at p. 81, on the law in Spain, which deduces, from the principle of participation, norms that are intended to ensure the formation of an independent opinion by each of the members of parliament).

Another question, which does not require discussion in the case before us, is which of the other rights of Knesset members in the fulfilment of their functions are basic parliamentary rights in the legislative process, such that the denial thereof may lead to judicial intervention in the legislative process (with regard to the parliamentary rights of members of parliament, see *Movement for Quality Government in Israel v. Attorney-General* [20], at p. 557; *Litzman v. Knesset Speaker* [14], at p. 588 {**Error! Bookmark not defined.**}; Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' *supra*, at pp. 762-763, 780-783; Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, at pp.

174-177; K. Hailbronner and H.P. Hummel, 'Constitutional Law,' in W.F. Ebke and M.W. Finkin (eds.), *Introduction to German Law* (1996), at p. 57; HCJ 742/84 *Kahana v. Knesset Speaker* [3], at pp. 89-94; HCJ 669/85 *Kahana v. Knesset Speaker* [4], at pp. 399-400; Olson, *Democratic Legislative Institutions: A Comparative View*, at pp. 84-87; the remarks of Justice M. Cheshin in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [15], at p. 541). But this question, as aforesaid, does not require a decision in this case.

25. Does a legislative process of the Arrangements Law type deny members of the Knesset a practical opportunity of formulating their position with regard to the draft law, as alleged by the petitioners? As we said above with regard to the fundamental claims against the legislative mechanism of the Arrangements Law, no one disputes that the legislative process of this kind is characterized by the fact that many different issues are addressed in it as one package, within the framework of a very short period of time. It will be remembered that we discussed how we are concerned with a legislative process that makes it very difficult to hold thorough and comprehensive deliberations, and that impairs the ability of the decision-makers in the government and the Knesset to form a considered opinion on each of the issues that appear in the draft law. But this is still not sufficient to harm the legislative process to such an extent that judicial intervention is justified. As we established above, in order to justify judicial intervention in the legislative process, it is not sufficient to prove a violation of a basic principle of the legislative process, such as the principle of participation, but it is also necessary to show a severe and substantial violation of that principle. Therefore, even if it is proved that the legislative process prevented the holding of thorough and comprehensive deliberations and impaired the ability of the Knesset members to form a considered opinion with regard to each of the issues that appear in the draft law, this is insufficient in order to justify judicial intervention (see and cf. HCJ 6124/95 *Ze'evi v. Knesset Speaker* [22]). It is *prima facie* difficult to imagine what will be the extreme cases, if at all, in which the scope of the issues in the draft law will be so great, and the legislative process will be so rushed, that there will be a basis for holding that the Knesset members have been denied any practical possibility of knowing about what they are voting. Only in such extreme and rare cases, which we hope are not to be expected in our parliamentary reality, there will be no alternative to the conclusion that the Knesset members had *de facto* no practical possibility of formulating their position with regard to the draft law, and that we are concerned with a *severe*

and substantial violation of the principle of participation in the legislative process.

'Legislative due process'

26. Hitherto we have said that when the court considers contentions against the legislative process, it will consider whether the legislative process suffered from a 'defect that goes to the heart of the process,' in the sense that the court will examine whether the process suffered from a defect that involved a severe and substantial violation of the basic principles of the legislative process in our parliamentary and constitutional system. Among the basic principles of the legislative process we discussed how, according to the principle of participation, each Knesset member has a right to participate in the legislative process, and this necessitates, at the very least, a legislative process in which the Knesset members are given a practical opportunity of forming an opinion with regard to the draft law. This leaves unanswered the question as to what is the law if the Knesset members are given an opportunity to participate in the process and to form an opinion with regard to the draft law, but this opportunity was not realized. What is the law when the Knesset members have not held even a minimal debate on the draft law? Within the framework of judicial scrutiny of the legislative process, should we insist upon a minimum amount of participation in the legislative process or a minimal factual basis and a minimal debate on the draft law before the law is adopted? This question arises because of the claim of some of the petitioners that the law addressed by the petitions before us and laws of the Arrangements Law type in general should be declared void, because no 'legislative due process' takes place in the course of legislating them, and because they are adopted without a sufficient factual basis and without sufficient debate. Indeed, the question whether there is a basis for adopting a legal requirement of a 'legislative due process' in our law has particular importance in the context of the Arrangements Law, since, as we have said above, this legislative mechanism gives rise to many claims that it does not involve a proper decision-making process, that it is not based on a sufficient factual basis and on thorough and comprehensive deliberations, and that such a process is likely also to impair the product of the legislative process.

Judicial review of the decision-making process, in so far as the decisions of administrative authorities are concerned, has long been accepted in our legal system (see Zamir, *Administrative Authority*, *supra*, at pp. 733-771). The case law of this court imposes a legal obligation of 'due process' for the decision-making of administrative authorities (see, for example, HCJ 297/82 *Berger v.*

Minister of Interior [23], at p. 49), the government (see, for example, HCJ 3975/95 *Kaniel v. Government of Israel* [24], at pp. 493-494), and, to a certain extent, also the Knesset in so far as a quasi-judicial proceeding is concerned (thus, for example, in HCJ 1843/93 *Pinhasi v. Knesset* [25] the court set aside a decision of the House to remove the immunity of Deputy Minister Pinhasi because of the absence of a minimal factual basis, and see also HCJ 1843/93 *Pinhasi v. Knesset* [26], at pp. 697-698, 709-719). The petitioners now request that we also impose a similar legal obligation of due process on the Knesset in the legislative process.

27. The 'legislative due process' approach has been much discussed in academic articles in the United States, even though it has not yet received direct approval in the case law of the United States Supreme Court. The expression 'legislative due process' was coined in the classic article of the scholar Justice Hans Linde, 'Due Process of Lawmaking,' 55 *Neb. L. Rev.* (1975-1976) 197, and since then the idea of the 'legislative due process' has been developed and extended in American academic articles (see, for example, V. Goldfeld, 'Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation through Judicial Review of Congressional Processes,' 79 *N.Y.U. L. Rev.* (2004) 367; P.P. Frickey and S.S. Smith, 'Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique,' 111 *Yale L.J.* (2001-2002) 1707, at pp. 1709-1727; D.T. Coenen, 'The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review,' 75 *S. Cal. L. Rev.* (2001-2002) 1281.

As stated above, the 'legislative due process' approach has not yet been adopted by the United States Supreme Court, even though judicial review of the legislative process is recognized in the United States. The court is competent to declare a law void if it was enacted contrary to the legislative rules established in the United States Constitution (see *United States v. Munoz-Flores* [48]; for a survey of the rules of legislation regulated in the United States Constitution, see Vermeule, 'The Constitutional Law of Congressional Procedure,' *supra*). Nonetheless, legal scholars in the United States are of the opinion that in the last decade it is possible to see a growing trend in the decisions of the United States Supreme Court to exercise in certain areas, such as with regard to federal legislation that violates the autonomy of the States, not only judicial review on the content of statutes, but also review of the legislative process, by adopting certain requirements of 'due process' in the legislative process. This trend finds expression, *inter alia*, in the fact that within the framework of examining the constitutionality of statutes, the court

examines also the minutes of the deliberations of Congress during the legislative process in order to check whether Congress relied on a sufficient factual basis (among the main judgments that are considered the main examples of this trend in the United States Supreme Court, the judgments in *United States v. Lopez* [49] and *Board of Trustees v. Garrett* [50] are habitually cited. On this new trend in the case law of the United States Supreme Court, see: Coenen, 'The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review,' *supra*, at pp. 1314-1328; Goldfeld, 'Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation through Judicial Review of Congressional Processes,' *supra*, at pp. 371-372, 410-411; Frickey & Smith, 'Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique,' *supra*, at pp. 1718-1728; A.C. Bryant and T.J. Simeone, 'Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes,' 86 *Cornell L. Rev.* (2000-2001) 328, at pp. 329-354; W.W. Buzbee and R.A. Schapiro, 'Legislative Record Review,' 54 *Stan. L. Rev.* (2001-2002) 87; R. Colker and J.J. Brudney, 'Dissing Congress,' 100 *Mich. L. Rev.* (2001-2002) 80; H.J. Krent, 'Turning Congress into an Agency: The Propriety of Requiring Legislative Findings,' 46 *Case W. Res. L. Rev.* (1995-1996) 731; M.A. Hamilton, 'Buried Voices, Dominant Themes: Justice Hans Linde and the Move to Structural Constitutional Interpretation,' 35 *Willamette L. Rev.* (1999) 167, at pp. 172-181. A trend to support a specific model of 'legislative due process' can be found also in the minority opinion of Justice Stevens in *Delaware Tribal Business Committee v. Weeks* [51], at pp. 97-98, and in *Fullilove v. Klutznick* [52], at pp. 548-552; see also the analysis of this case law in Goldfeld, *supra*, at pp. 405-407 and in Frickey & Smith, *supra*, at p. 1717 and note 43). But as we shall make clear below, even if the 'legislative due process' approach had been embraced in its entirety by the United States Supreme Court, this far-reaching approach is unacceptable in our legal system.

28. The guiding principle, which runs through our case law concerning judicial review of the activity of the Knesset, holds that the scope of the judicial review is determined by the special status of the Knesset and the nature of the activity under consideration. 'Indeed, the special status of the Knesset, as enshrined in the Basic Laws and in the structure of our democracy, requires the court to exercise its discretion to carry out judicial review of the Knesset's actions with caution and restraint' (*per* President Barak in *Livnat v. Chairman of Constitution, Law and Justice Committee* [8], at p. 809). Moreover, the scope of the judicial review is related not only to the relevant

authority (in our case, the Knesset) but also to the type of activity under consideration. The approach reflected in the rulings of this court makes the scope of the judicial review dependent upon the nature of the act of the Knesset (*Livnat v. Chairman of Constitution, Law and Justice Committee* [8], at p. 809; see also *Movement for Quality Government in Israel v. Knesset Committee* [7], at pp. 140-141 (*per* Justice M. Cheshin), and at pp. 164-170 (*per* Justice Rivlin)). This approach, which makes the scope of the judicial review dependent on the nature of the Knesset's act has, admittedly, been criticized in academic circles (see, for example, Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' *supra*, at pp. 776-778), but this criticism has been rejected in the case law of this court (see the remarks of President Barak in *Livnat v. Chairman of Constitution, Law and Justice Committee* [8], at pp. 811-815). Therefore we emphasized above that this court will act with self-restraint and with great caution in all matters concerning the judicial review of parliamentary proceedings, and especially with regard to the legislative process itself (see at para. 16 *supra*).

It follows that we should not impose on the Knesset the same requirements of due process for decision-making that are imposed on administrative authorities, and when we are dealing with the legislative process, we should not impose on the Knesset even those limited requirements that are imposed on it with regard to a quasi-judicial proceeding. The distinction between the duties imposed on the Knesset in the legislative process and the duties imposed on administrative authorities when they make decisions was discussed in *Nimrodi Land Development Ltd v. Knesset Speaker* [6], which considered the question whether a violation of the petitioners' right of hearing before the Knesset Committee that considered the draft law constitutes a 'defect that goes to the heart of the matter' in the legislative process. The court, *per* Justice Barak, held that 'the answer to this is no' and added that 'the reason for this position lies in the general outlook that the Knesset — as distinct from executive authorities that are required to act reasonably within the framework of their limited powers and therefore usually have a duty to give a right of hearing — does not have… a duty to give an individual right of hearing to parties who have an interest in the legislative process… imposing a duty to give such a hearing would disrupt the legislative process of the supreme legislature in our legal system' (*Nimrodi Land Development Ltd v. Knesset Speaker* [6], at pp. 157-158. This position was recently confirmed in *Yanoh-Jat Local Council v. Minister of Interior* [11], at pp. 715-716. See also HCJ 3468/03 *Israel Local*

Authorities Centre v. Government of Israel [27], at para. 4). Moreover, one of the main criticisms in American academic circles against the emerging trend in the case law of the United States Supreme Court during the last decade is that the court has imposed on the legislative process in Congress duties from administrative law as if it were an administrative authority making an ordinary administrative decision (a phenomenon that Krent calls 'turning Congress into an agency' in his article 'Turning Congress into an Agency: The Propriety of Requiring Legislative Findings,' *supra*; see also Frickey & Smith, 'Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique,' *supra*, at p. 1751; Bryant & Simeone, 'Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes,' *supra*, at pp. 369-373; Buzbee & Schapiro, 'Legislative Record Review,' *supra*, at pp. 119-135; Colker & Brudney, 'Dissing Congress,' *supra*, at p. 83).

29. The conclusion is therefore that the legislative process of the Knesset should not be subject to a demand to comply with due process in making decisions, in the same way that administrative authorities are, and therefore not every defect in process that would be considered a defect going to the heart of a matter if an administrative decision of an executive authority were concerned (or even if a quasi-judicial proceeding of the Knesset were concerned) should be considered a defect going to the heart of the Knesset's legislative process. The purpose of judicial review of the legislative process is not to ensure that the Knesset carries out the optimal legislative process. The purpose of judicial review of the legislative process is also not to ensure that the Knesset carries out a responsible and balanced process for each draft law. The purpose of judicial review of the legislative process is to protect against a severe and substantial violation of the basic principles of the legislative process in our parliamentary and constitutional system. Therefore, this court will restrict its judicial review of the legislative process to protection of the right of members of the Knesset, which is derived from the right of those who elected them and from the principle of representation, to participate in the legislative process. But when the members of the Knesset have been given a practical possibility of participating in the legislative process, and they chose not to realize it, it is not the role of the court to compel them to do so.

Indeed, there is admittedly a correlation between the principle of participation and the 'legislative due process' approach. Thus, if members of the Knesset are not given a practical opportunity of participating in the legislative process, the Knesset cannot carry out legislative due process.

Similarly, the *de facto* existence of due process and of sufficient debate in the legislative process may be an indication of the fact that Knesset members indeed had a practical possibility of participating in the process. But there is a cardinal distinction between the principle of participation and the 'legislative due process' approach, because the principle of participation is intended to ensure the right of the Knesset and its members to participate in the legislative proceeding, whereas the 'legislative due process' approach imposes a legal duty on the members of the Knesset to participate properly in the legislative process. In other words, the principle of participation is intended to protect the ability and right of the Knesset member to fulfil his function, whereas the 'legislative due process' approach imposes on him a duty to fulfil his function. According to our legal system, in view of the special status of the Knesset and in view of the special nature of the legislative proceeding, and according to the proper weight that should be attributed to the principle of the separation of powers in our legal system, the role and duty of the court are limited to the protection of the right of Knesset members to participate in the legislative proceeding, whereas the public (as opposed to the legal) duty to realize this right and to carry out legislative due process rests with the Knesset and its members.

From the general to the specific

30. Indeed, the legislative process of the law which is the subject of these petitions, and especially the Agriculture Chapter, is a clear example of the excessive and improper use that the Knesset has made of the legislative mechanism of the Arrangements Law type in recent years. It will be remembered that this draft law was extensive in scope and contained a variety of subjects, and it was enacted in a very rushed legislative process, involving several departures from the ordinary rules of legislation. Moreover, the structural changes that the Agriculture Chapter makes to the agricultural boards are the kind of major and far-reaching changes that ought not to be made in a legislative process of the Arrangements Law type. To this we should add that we have not found any convincing explanation in the pleadings of the respondents as to why this reform was so urgent that it was necessary to include it within the framework of emergency economic legislation, and at least some of the changes that the Agriculture Chapter makes, such as the transfer of powers from the boards to the minister and the change in the method of appointing board members, have no direct and necessary connection with the budget. But all of these factors are insufficient justification for declaring the Agriculture Chapter void.

As we have seen above, according to the prevailing legal position, and in view of the power of the Knesset Committee to approve departures from the legislative processes provided by the Knesset Procedure Rules, there is no formal restriction on the power of the Knesset to make use of rushed legislative processes within which framework it considers many different subjects as one package, and within which framework the draft law is considered in its entirety by the Finance Committee. Similarly, according to the prevailing legal position, there is no formal restriction on the type of issues that can be included in a law of the Arrangements Law type, and therefore the mere fact that we are concerned with a rushed legislative process of the Arrangements Law type does not in itself lead to a conclusion that there is a basis for judicial intervention in the legislative process. Thus, even the claim that it was improper to make use of the legislative mechanism of the Arrangements Law for the enactment of a specific issue, no matter how justified it may be, does not in itself lead to a conclusion that there is a basis for judicial intervention in the legislative process. The question before us is, therefore, whether a 'defect that goes to the heart of the process,' i.e., a defect that involved a severe and substantial violation of the basic principles of the legislative process in our parliamentary and constitutional system, occurred in the legislative process of the Agriculture Chapter.

We accept the petitioners' argument that the legislative process in this case made it difficult to hold a thorough and comprehensive debate and impaired the ability of the members of the Knesset to form a considered opinion with regard to each of the issues that appear in the draft law. Notwithstanding, for the reasons that we explained above, this is insufficient for us to say that there was a defect in the legislative process that justifies our intervention. In this case, in view of the deliberations that took place in the Knesset Committee, no matter how limited they were, and in view of the explanations that were given there on behalf of the government to the Knesset members, it cannot be said that the Knesset members were given *no practical possibility* of knowing on what they were voting, and that they were denied *any practical possibility* of forming an opinion with regard to the Agriculture Chapter. Therefore, and since we have said that according to our legal system the court will not carry out a review of 'legislative due process,' there are no grounds for our intervention in the legislative process.

The result, therefore, is that even though the legislative process that took place in this case for making the reforms to the agricultural boards was

undesirable, we have not found in this process any 'defect that goes to the heart of the process' that may justify a declaration that the Chapter is void.

31. In summary, we have discussed in depth the very problematic nature of the legislative mechanism of the Arrangements Law type from the viewpoint of proper democratic process, from the viewpoint of the principle of the separation of powers and from the viewpoint of the representative democracy of the Israeli parliamentary system. Therefore the Knesset should address the very problematic nature of this legislative mechanism and ensure that use of this mechanism, if at all, is made in an intelligent and sparing manner. According to our approach that was set out above, the solution to the situation created by the excessive use made of this legislative mechanism does not lie with the court, but first and foremost with the legislature. Indeed, the legislative mechanism of the Arrangements Law type harms the standing of the Knesset as the legislature of the State, and it is the duty of this court to sound the alarm in this regard (see and cf. HCJ 6791/98 *Paritzky v. Government of Israel* [28], at p. 778; *Rubinstein v. Minister of Defence* [2], at p. 511 {177}; HCJ 266/68 *Petah Tikva Municipality v. Minister of Agriculture* [29], at p. 833), but the role of protecting the standing of the Knesset against legislative mechanisms that allow the executive to trespass upon its province lies first and foremost with the Knesset itself. Indeed:

> 'The Knesset alone can change the rules of the game. The power given to the executive authority and the judicial authority is the power that the Knesset — in its role as the constitutive authority (in Basic Laws) or in its role as the legislative authority (in ordinary laws) — gives them… this characteristic has special meaning in the relationship between the Knesset and the government… but in addition to this, the supremacy of the Knesset implies that the important and fundamental decisions concerning the nature of the system of government shall be made by the Knesset and not by the other authorities. This is a power that is unique to the Knesset. This power gives rise to a duty. The Knesset is obliged to realize this power itself, and it may not… transfer this power to another' (Barak, 'Parliament and the Supreme Court — A look to the future,' *supra*, at p. 7).

Therefore we repeat the recommendation that the Knesset should consider the scope of the use of the problematic legislative mechanism of the Arrangements Law and regulate the issue in legislation. In this respect, we

should also mention, in closing, that in recent years considerable criticism has also been heard from Knesset members themselves on the excessive use of the legislative mechanism of the Arrangements Law, and this criticism has been expressed, *inter alia*, in concrete proposals to change the Knesset Procedure Rules and proposals for legislation that will restrict the use of this legislative mechanism in various ways. Since the decision with regard to the manner of restricting the use of the legislative mechanism of the Arrangements Law lies as aforesaid with the legislature, we do not see any reason to express an opinion on the individual nature of the proposals.

The claims against the content of the law

32. The Agriculture Chapter made as aforesaid three main changes to the agricultural boards: one change is the consolidation of the plant boards into one board; the other two changes, which are relevant both to the plant boards and to the Poultry Board, are the transfer of the main regulatory powers from the boards to the minister and a change of the method of electing the representatives of the farmers to the boards. The petitioners mainly attack the first two changes — the consolidation of the plant boards and the transfer of the powers from the boards to the minister — and also the transition provisions that were enacted in order to implement them. *Inter alia*, they claim that these changes harm property, the freedom of occupation, the right of representation, the freedom of association, equality and human dignity. Of the diverse claims of the petitioners, we find that the claim with regard to the violation of freedom of occupation and the claim with regard to the violation of property rights are the main claims that require consideration, and therefore we think it right to focus our deliberation on these.

Violation of the farmers' freedom of occupation

33. The petitioners claim that the reforms to the agricultural boards unlawfully violate the farmers' freedom of occupation, which is enshrined in s. 3 of the Basic Law: Freedom of Occupation. Indeed, no one disputes that legislation that regulates an occupation in any field naturally involves a restriction on the freedom of occupation. The parties do not dispute the fact that the agricultural board laws that preceded the Agriculture Chapter included broad and substantial restrictions on the freedom of occupation. They also do not dispute the fact that these restrictions remained even after the reforms made by the Agriculture Chapter. The petitioners do not even dispute the fact that regulation is needed for the agricultural sectors to which the Agriculture Chapter applies. The dispute revolves around the question whether, apart from the purpose of regulation, the Agriculture Chapter was intended for other —

improper — purposes, and whether the transfer of most of the regulatory powers from the boards to the minister makes the violation of the farmers' freedom of occupation disproportionate.

34. The declared purpose of the Agriculture Chapter and of all the reforms included therein is to bring about an effective and fair regulation of the agriculture sectors that the Agriculture Chapter addresses. According to the respondents, the purpose of the reforms that the Agriculture Chapter introduces is to reduce the costs of the regulatory activity and to ensure a proper balance between the interests of all the parties concerned that are affected by this regulatory activity: the farmers, manufacturers, exporters, marketers and consumers.

The petitioners do not dispute the fact that the aforesaid purpose is a proper purpose. On the contrary, the petitioners themselves say that there is a need for State regulation of the agricultural sectors that are addressed by the Agriculture Chapter, and that the purpose of this regulatory activity is not merely to help farmers and protect their interests, but to find a balance between the interests of all the parties involved in the sector. Indeed, the declared purpose that underlies the Agriculture Chapter — effective and fair regulatory activity that will ensure a proper balance between the interests of all the parties involved in the various agricultural sectors — is a proper one (see HCJ 4769/95 *Menahem v. Minister of Transport* [30], at p. 264; see also *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [15], at p. 342 *per* President Shamgar and at pp. 434-435 *per* President Barak).

Alongside the declared purpose, which is not the subject of dispute, the petitioners claim that there is another — improper — purpose that underlies the Agriculture Chapter. They allege that the real motive that underlies the Agriculture Chapter was the desire of the Minister of Agriculture to take control of the agricultural boards and their assets. The petitioners were unable to prove this claim. After we examined the petitioners' claims, the legislative history, the record of the Knesset and the minutes of the Finance Committee, we did not find a sufficient basis in fact and evidence to support the petitioners' claims with regard to any improper motives on the part of the Minister of Agriculture, and therefore the claims with regard to a hidden, improper purpose behind the law cannot be accepted.

In summary, the Agriculture Chapter and the reforms made to the plant boards and the Poultry Board satisfy the proper purpose test.

35. Now that we have reached the conclusion that the provisions of the Agriculture Chapter were intended for a proper purpose, it remains to consider whether their violation of the freedom of occupation is 'excessive.' The petitioners claim that the main justification for the restrictions that were imposed on the agricultural boards with regard to the freedom of occupation of the farmers was the freedom of the farmers to control the nature and scope of these restrictions by means of their representatives' control of the boards. Their argument is that according to the arrangements that prevailed before the Agricultural Chapter, the farmers had autonomy to restrict themselves as they chose, for their benefit and in their own interests, with self-imposed restrictions, as opposed to restrictions imposed from above. By contrast, under the new arrangement, these restrictions are imposed and determined by the minister. Therefore they claim that the transfer of most of the regulatory powers to the minister makes the violation of the farmers' freedom of occupation disproportionate.

In response, counsel for the respondents argues that the arrangements provided in the Agricultural Chapter involve a more proportionate and limited violation of the freedom of occupation than the one in the previous arrangements. She argues that regulatory activity that restricts the freedom of occupation, no matter how justified, should usually be done by an executive authority outside the sector. Counsel for the respondents argues that the regulation of a sector of the economy by a body that is controlled by those operating in the sector, which was being done by the boards before the Agricultural Chapter was introduced, gives rise to a concern of abuse of power, and it may even exacerbate market failures, which are the reason for regulation in the sector. To this counsel for the respondents wishes to add that the regulation of the occupation in agricultural production sectors has an effect on additional sectors, and that this regulatory activity also involves a violation of the freedom of occupation of other parties who are involved in the agricultural sectors, apart from the farmers. Therefore she argues that the regulatory power should be given to the State and not to the farmers' representatives, and therefore the violation of the freedom of occupation resulting from the Agricultural Chapter is the smallest possible violation that may arise from legislative regulation of the agricultural sector (and, as aforesaid, even the petitioners do not oppose the actual need for regulation).

So we see that the parties do not dispute the need for regulation of the agricultural sectors that are governed by the Agricultural Chapter, but they are divided as to the proper method of regulation. The petitioners espouse the

continued regulation of these sectors in accordance with the method of regulation that was practised before the enactment of the Agricultural Chapter, whereas the respondents espouse the method introduced by the Agricultural Chapter.

In matters of the State budget and the economy, which involve wide-ranging social and economic aspects, there may sometimes be a variety of purposes and possible modes of operation. The decision between these may be derived from various socio-economic outlooks, all of which may be held within the framework of the Basic Laws. Therefore, in these areas the authorities responsible for economic policy — the executive and the legislature — should be given a broad scope of choice when they determine the economic policy and are responsible to the public and the nation for the State budget and economy. Therefore, we have emphasized in our rulings on several occasions that although the court will not shy away from judicial review of the constitutionality of statute, it will act with judicial restraint, caution and self-discipline especially in these areas, and it will refrain from reshaping the policy that the legislature saw fit to adopt. In this regard, it has been said that:

> '… even though the court will not refrain from constitutional review of legislation concerning the shaping of economic policy and the regulation of sectors of the economy, it will act in this respect with caution. It will exercise its constitutional review in order to protect constitutional rights within the framework of the limitations clause, but it will refrain from reshaping the economic policy that the legislature saw fit to adopt. In this way, the court will preserve the delicate balance between majority rule and the principle of the separation of powers, on the one hand, and protection of basic values and human rights, on the other…' (*Menahem v. Minister of Transport* [30], at p. 264; see also *ibid*., at pp. 263-264, 268-269, and HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [31], at p. 386).

The question whether a regulatory arrangement that gives most of the regulatory powers to an external executive authority is preferable to a regulatory arrangement which gives most of the regulatory powers to a party within the sector is clearly a question of economic policy. This question does not concern the court, which does not examine the wisdom or effectiveness of Knesset policy. Therefore even if we were prepared to accept the petitioners'

claim that the transfer of most of the regulatory powers from the boards, which are controlled by the farmers, to the minister, increases the violation of the farmers' freedom of occupation, the government is entitled to realize its economic policy and to act in order to reduce the influence of the farmers in regulating the agricultural sectors and to increase the involvement of an external government body in the interests of the public as a whole. For this purpose, the government and the Knesset have a 'constitutional freedom of manoeuvre' to choose from among the proportionate measures for realizing their economic policy, and as long as they do not depart from the 'zone of proportionality,' the court will not intervene in their discretion (see *Menahem v. Minister of Transport* [30], at pp. 268-269, 280; *Israel Investment Managers Association v. Minister of Finance* [31], at pp. 385-389; HCJ 5578/02 *Manor v. Minister of Finance* [32], at para. 14 of the opinion of President Barak).

36. After examining the arrangements set out in the Agricultural Chapter, we have reached the conclusion that the measures chosen in this case do not depart from the zone of proportionality. As aforesaid, the purpose of the provisions of the Agricultural Chapter that transfer the regulatory powers from the boards to the Minister of Agriculture is to create a regulatory arrangement that will protect the interests of all the parties affected by the regulation of the agricultural sectors. According to the respondents' outlook, the method for realizing this purpose is to transfer the regulatory powers from the boards, which mainly represent the interests of the farmers (which are not necessarily the same as the interests of the other parties affected by the regulatory arrangements), to a central body of State that has a general viewpoint and will take into account all the 'players' and the economy as a whole.

Indeed, according to the arrangements that preceded the Agricultural Chapter, the boards that were controlled by the farmers' representatives had broad powers. They had the power to restrict, by means of rules, the freedom of occupation of the farmers (including the power to restrict the entry of new farmers into the sector), manufacturers, exporters and marketers, and to influence the prices and quantities of the agricultural produce. The power of the Minister of Agriculture according to the arrangements that preceded the Agricultural Chapter was more restricted. The arrangements that preceded the Agricultural Chapter did not allow the minister, or even the government as a whole, to change the regulatory policy prevailing in the agricultural sectors and to make changes to the rules made by the boards, because the power to make rules and change them was given to the boards, whereas the ministers

were given the power to approve them. In view of the purpose of the Agricultural Chapter as set out above, it can be said that the measure chosen — transferring the power to make the regulatory rules from the boards to the minister — is a measure suited to achieve the legislative purpose that the government and the legislature wished to achieve.

Moreover, a study of the Plant Board Law and the Poultry Board Law shows that the powers that were transferred to the minister in the Agricultural Chapter concern regulation of the agricultural sectors on the highest level, such as making rules that concern planning the crops, determining the scale of production and crops, making rules for marketing methods, making rules with regard to granting export permits, imposing charges on farmers, authorized marketers or exporters. We are therefore speaking of regulating the agricultural sectors on the level of policy-making and of powers that involve a potential to harm the interests of all the groups operating in the agricultural sectors and a restriction of the freedom of occupation of the members of these groups. By contrast, many actions that are involved in the implementation of the policy of regulating the agricultural sectors, the ongoing management of the Plant Board and the Poultry Board and providing services to those operating in these sectors were left to the boards on which the farmers are represented. To this it should be added that many regulatory powers that were transferred to the minister are subject to a duty of consultation with the board before they are exercised. This, for example, is the case with regard to determining the quantity of the crops, making rules for regulating the market and making rules for granting export permits. Similarly, the power of the minister to levy charges is subject to a duty to hear the position of the sector committees and the subcommittees before levying them (and is also subject to the consent of the Minister of Finance and the approval of the Finance Committee of the Knesset).

The Agricultural Chapter therefore created a distinction between the regulatory powers on the level of policy, which are capable of harming basic rights of various sectors and which according to the outlook of the legislature should be transferred to the minister in order to realize the purpose of the legislation, and the powers that according to the aforesaid outlook do not need to be transferred to the minister in order to realize the purpose of the legislation. Likewise, it is possible to see that the Agricultural Chapter left a substantial role to the farmers' representatives in the ongoing management of the boards. The conclusion is therefore that this is an arrangement that does not depart from the zone of proportionality that is available to the legislature

in accordance with the accepted proportionality tests in our case law (see: *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [15], at pp. 436-437; *Israel Investment Managers Association v. Minister of Finance* [31], at pp. 385-386, 388-389; *Menahem v. Minister of Transport* [30], at pp. 279-280).

37. We should further point out, in closing, that the main claim of the petitioners concerning the proportionality of the restriction on the freedom of occupation of the farmers is contained in their argument against the right of representation of the farmers in the boards as a result of the legislation of the Agricultural Chapter. The main claim, in this context, is that the reduction in the regulatory powers of the boards and the transfer of the powers to the minister violates the right of representation of the farmers on the boards, despite the fact that formally the principle of representation by the farmers' representatives on the boards is maintained even in the era after the enactment of the Agricultural Chapter.

The question of the existence and scope of the right of representation of parties from the sector on statutory boards that regulate the occupation in that sector is complex, and the question whether this is a constitutional right is even more so. In so far as the claim is that this is an independent right, it is doubtful whether it falls within the scope of the constitutional debate when we are speaking of bodies of the type of the agricultural boards. In so far as the claim is that this right is included within the framework of the freedom of occupation, in our case this is insufficient to make the violation of the freedom of occupation disproportionate.

Violation of property rights

38. Over the years, the agricultural boards acquired money and assets, including rights in independent corporations (such as Agrexco and the Natural Risks Fund). These assets were accumulated, at least in part, with the money from charges that were paid by the farmers. According to the position that preceded the Agricultural Chapter, the farmers' representatives had control, or at least decisive influence, by virtue of the majority that they had on the agricultural boards, over the amount of the charges that were imposed on the farmers and over the use made of the boards' assets and money. As aforesaid, the Agricultural Chapter provided that the plant boards would cease to operate, and their assets would become the property of the consolidated board. In addition, as we explained above, the Chapter transferred most of the regulatory powers of the agricultural boards and the power to levy charges to the Minister of Agriculture.

The petitioners' claim is that these changes constitute a violation of property rights which, it is well known, is enshrined as a basic constitutional right in s. 3 of the Basic Law: Human Dignity and Liberty. The petitioners argue that these changes harm both the property right of the agricultural boards and the property right of the farmers. The violation of the property right of the agricultural boards is reflected, allegedly, in the transfer of the property of the plant boards to the new consolidated board and also in the provisions that allegedly transfer the control of the boards' assets to the Minister of Agriculture. The violation of the property rights of the farmers is allegedly reflected in the fact that all of the changes made by the Agricultural Chapter restricted the control that the farmers had, through their representatives on the board, over the amount of the charges and the use made of the money from the charges and of the other assets of the boards. The respondents claim, however, that there is no violation of the property rights of the boards or the farmers in this case. Let us first consider the alleged violation of the property right of the farmers, and after that the alleged violation of the property right of the boards.

Violation of the property rights of the farmers

39. The petitioners claim, as aforesaid, that the reforms made by the Agricultural Chapter to the agricultural boards violate the property rights of the farmers. Counsel for the petitioners are aware that formally the farmers have no property rights in the assets of the boards. Notwithstanding, they claim that the rights of the farmers in the boards' assets derive from the fact that the source of the assets was the money from charges paid by the farmers, the fact that the money was originally designated for the benefit of the farmers and the fact that, before the new law, the representatives of the farmers had control, by virtue of their majority on the board, over the accumulation and use of the assets. Likewise, they claim that the farmers imposed on themselves (through their representatives on the board) the payment of the charges and paid these to the boards in reliance upon the expectation that in the course of time their representatives on the board would decide what to do with the assets. According to them, this reliance is a constitutional property right that should be protected.

40. We cannot accept the petitioners' claim that the farmers have a property right in the assets of the boards. The assets are the property of the boards, and the fact that these assets were accumulated, at least in part, by means of levying charges on the farmers does not give the farmers a property

right in these assets. In this regard, it is appropriate to cite the remarks of Vice-President Or in *Yanoh-Jat Local Council v. Minister of Interior* [11] on the claim that the inhabitants of a local authority have a property right in the assets of the authority, because they participated (whether directly or indirectly) in funding their building:

> 'I do not think that the inhabitants of a local authority have a property right in the public facilities of the local authority, whether they participated actively in funding their building or not. The public facilities and the public buildings are the property of the local authority. The inhabitants of the local authority only have a right to use the public facilities and buildings, when there is no prohibition of this under the law, without derogating from the right of others to use them… In any case, the inhabitants of the local authorities, who are the petitioners, do not have a constitutional property right in the facilities of the councils, whether they participated in the financing of them directly… or indirectly. What they do have is the right to use the facilities…' (*Yanoh-Jat Local Council v. Minister of Interior* [11], at p. 718).

Admittedly, the agricultural boards, unlike the local authorities, are special statutory boards that were intended to regulate the agricultural sectors of the farmers; among the other purposes that motivated the legislature in setting up the boards was also the purpose of protecting the special interests of the farmers and the relevant agricultural sectors, and for this purpose the farmers' representatives were given a significant status on those boards and influence over the management of their assets, but nothing in these characteristics is sufficient to give the farmers a protected constitutional property right in the assets of the boards.

Moreover, we are prepared to accept the claim that the farmers paid the charges with the expectation that their representatives on the boards would have control of the use that would be made of this money. But the fact that the farmers have an interest that their representatives should continue to control the use that will be made of the boards' assets, and even an expectation that this would happen, still does not give them a constitutional property right to this effect. The agricultural boards are a creation of statute, and the farmers do not have an innate right that the structure of the boards and the scope of their powers, as determined in statute prior to the enactment of the Agricultural Chapter, will remain unchanged (cf. HCJ 4746/92 *G.P.S. Agro Exports Ltd v. Minister of Agriculture* [33], at p. 257; HCJ 198/82 *Munitz v. Bank of Israel*

[34], at p. 470). The case law of this court has already determined that 'there is a limit to property rights, even in the broad meaning of the Basic Law, and it should not be stretched beyond the limit' (*per* Justice Zamir in HCJ 4806/94 *D.S.A. Environmental Quality Ltd v. Minister of Finance* [35], at p. 200. With regard to the scope of the property right in the constitutional context, also see and cf. *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [15], at pp. 328, 431, 470-471; LCA 3527/96 *Axelrod* v. *Property Tax Director, Hadera Region* [36], at p. 409; *Manor v. Minister of Finance* [32], at p. 739 *per* President Barak, and cf. the opinions of Justices Grunis and Rivlin (at pp. 733-734); *Yanoh-Jat Local Council v. Minister of Interior* [11], at pp. 716-718; Y. Weisman, 'Constitutional Protection of Property,' 42 *HaPraklit* (1995) 258, at pp. 266-270; A. Yoran, 'Scope of the Constitutional Protection of Property and Judicial Intervention in Economic Legislation,' 28 *Mishpatim* (1997) 443, at pp. 447-448; M. Deutch, *Property* (vol. 1, 1997), at pp. 239-249; Y.M. Edrei, 'On Declarative Constitution and Constitutive Constitution — Position of the Constitutional Property Right on the Scale of Human Rights,' 28 *Mishpatim* (1997) 461, at pp. 521-523). The conclusion is therefore that the farmers do not have a constitutional property right to control, through their representatives, the assets that are the property of the boards.

We should also recall that even under the arrangement that preceded the Agricultural Chapter, the farmers never had an innate right (or even a reasonable expectation) that the agricultural boards would be administered, and that use would be made of their resources, solely for their benefit. The agricultural boards were set up as public bodies that were obliged to protect the interests of all the sectors affected by the regulation of the agricultural sectors, including the farmers, and also to protect the interests of the general public. Therefore, even according to the original structure of the agricultural boards, when they made use of their assets, they were obliged to act not merely as trustees for the farmers whose sectors they were regulating, but as trustees of the general public. The farmers therefore have, at most, a reasonable expectation that the assets of the boards will be used for the purposes for which they were intended under the laws governing the agricultural boards. But this expectation does not amount to a constitutional property right of the farmers. Moreover, even if we assume that this expectation is covered by the constitutional protection of property rights, nonetheless, as we have explained above, the Agricultural Chapter does not violate it disproportionately.

In summary, we have not found that the farmers have a protected property right in the assets of the boards, nor that their interest that their representatives on the boards should continue to control the use made of the boards' assets is covered by the constitutional protection of property. The reforms introduced by the Agricultural Chapter do not violate the constitutional property rights of the farmers, but, as we shall explain below, they violate the property rights of the boards.

Violation of the property rights of the agricultural boards

41. The petitioners' claim of a violation of the property right of the agricultural boards (which, it will be recalled, are statutory boards) raises several difficulties. The main one of these is the question whether the Basic Law: Human Dignity and Liberty also protects the rights of public corporations. The petitioners claim that even a public corporation enjoys the human rights guaranteed in the Basic Law, whereas the respondents deny this.

The case law of this court shows that a *private* corporation can have constitutional basic rights, with the exception of rights that by their very nature are unsuited to corporations (see, for example, CA 105/92 *Re'em Contracting Engineers Ltd v. Upper Nazareth Municipality* [37], at pp. 213-214; HCJ 726/94 *Klal Insurance Co. Ltd v. Minister of Finance* [38], at pp. 471-472; HCJ 4915/00 *Communications and Productions Network Co. (1992) Ltd v. Government of Israel* [39], at p. 464; HCJ 4140/95 *Superpharm (Israel) Ltd v. Director of Customs and VAT* [40], at p. 96; AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [41], at pp. 802-803 *per* Justice Grunis. Cf. also CA 6576/01 *C.P.M. Promotions Co. Ltd v. Liran* [42], at p. 823). In any case, with regard to the property right no one disputes that its nature is such that it may apply to a corporation (see, for example, A. Barak, 'Israel's Economic Constitution,' 4 *Mishpat uMimshal* (1997) 357, at p. 364; A. Yoran, 'The Constitutional Revolution in Israeli Taxation,' 23 *Mishpatim* (1994) 55, at pp. 66-68; Edrei, 'On Declarative Constitution and Constitutive Constitution — Position of the Constitutional Property Right on the Scale of Human Rights,' *supra*, at pp. 523-524, and *Re'em Contracting Engineers Ltd v. Upper Nazareth Municipality* [37], at p. 213). To this we should add that this court has, on several occasions in the past, considered the appeals and petitions of *private* corporations, which claimed that their constitutional right to property was violated, without considering at all the question whether the constitutional protection of property applies also to a corporation (for example, in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [15]; *D.S.A. Environmental Quality Ltd v.*

Minister of Finance [35]; HCJ 508/98 *MaTaV Cable Communication Systems Ltd v. Knesset* [43]; LCA 3145/99 *Bank Leumi of Israel Ltd v. Hazan* [44]).

However, the constitutional protection that applies to the property rights of private corporations does not necessarily imply that similar constitutional protection exists also for the property of *public* corporations such as the agricultural boards. According to the respondents, applying constitutional human right to public corporations raises difficulties that do not arise when applying these rights to private corporations. Thus, for example, questions arise such as whether the Basic Laws, which were mainly intended to protect human rights, were also intended to protect the rights of government bodies (including public corporations), and whether one government authority is able to have basic constitutional rights vis-à-vis another government authority (for the approach that government authorities and public corporations can have constitutional rights, see Barak, 'Israel's Economic Constitution,' *supra*, at p. 365; Barak, *Constitutional Interpretation*, *supra*, at p. 441). These are major and complex questions, and they have not yet been decided in the case law of this court, but it appears that it is possible to determine that at least some of the public corporations can have certain constitutional basic rights (with the exception of rights that, by their very nature, are unsuited to corporations), even without deciding the general question whether it is possible to apply to all government authorities, or even to all public corporations, the human rights in the Basic Laws. Public corporations are not all of the same type; some are closer in nature to a government authority and others are closer in nature to a private corporation (see Zamir, *Administrative Authority* (1996), vol. 1, at pp. 381-394, and cf. D. Barak-Erez, 'Public Corporations,' 19 *Iyyunei Mishpat* (1998) 273, at pp. 281-308). Therefore it is *prima facie* possible that the basic rights of public corporations and the degree of the constitutional protection thereof will be determined to apply in accordance with the nature of the public corporation. The more distant a public corporation is in nature from a government authority and the closer it is to a private corporation — *inter alia* from the viewpoint of the nature of the functions that it fulfils, the reason why it was set up and its structure and composition — the greater the tendency to recognize it as having the human rights given to a private corporation, and *vice versa*. But the decision on these questions, like also the narrower question whether the agricultural boards enjoy constitutional protection of their property rights, is not required in the case before us, and we will leave it to be decided at a later date. This is because, even if we assume that the boards have

constitutional property rights, and even if it is possible to argue that this right has been violated in the present case, nonetheless, as we shall explain below, the violation satisfies the terms of the limitations clause in the Basic Law.

42. The petitioners see a violation of the property rights of the plant boards, first and foremost, in the provisions of s. 73(b) of the Plant Board Law, which says the following:

> 'The Vegetable Board, the Fruit Board, the Citrus Fruit Marketing Board and the Ornamental Plant Board shall cease to exist on the date of commencement, and their assets, including all the registered trade marks in their names, shall become the property of the [Plant] Board' (square parentheses supplied).

The petitioners claim that the liquidation of the original plant boards and the transfer of their assets to a new body, the Plant Board, constitutes a violation of the property rights of the plant boards, which is tantamount to an expropriation of these boards without consideration. The petitioners also claim that the transfer of the assets of the original plant boards to the Plant Board raises a concern that the use of the property of the plant boards will not be in accordance with the original purpose for which their assets were accumulated. The concern is, according to the petitioners, that the assets of the original boards will not be used any longer for the benefit of their sector and the purpose for which the property right came into existence, but for the benefit of other sectors and for other purposes.

In addition, the petitioners argue that even the transition provisions in the Agricultural Chapter concerning the temporary administrations for the Plant Board and the Poultry Board contain a violation of the boards' property rights. The petitioners claim that the significance of these transition provisions, which are set out in s. 74(a) of the Plant Board Law and ss. 76-77 of the Poultry Board Law, is that during the transition period the boards (and the farmers' representatives on the boards) are deprived of the control of the assets of the boards, and it is transferred to a body controlled by the Minister of Agriculture. According to their argument, this taking over the control of the assets and the use that is made of them constitutes in itself a violation of the property rights of the boards, because the property right also includes the right to control the property. They also claim that the transfer of the control of the assets from the boards (and the farmers' representatives on the boards) to the minister violates property rights because it raises a suspicion that the use will not be made of the boards' assets merely for the original purpose for which they were accumulated.

43. Assuming that the plant boards are capable of having constitutional property rights (see above, at para. 41), we accept the petitioners' claim that the transfer of the assets of the original plant boards to the Plant Board, in accordance with s. 73(b) of the Plant Board Law, constitutes a violation of the property rights of those boards. With regard to the claim that there is a concern that use will be made of the property of the plant boards other than for the original purposes for which the assets of each of the boards were accumulated, we doubt whether such a concern for the future amounts to a violation of a constitutional right (see *Yanoh-Jat Local Council v. Minister of Interior* [11], at pp. 716-717). Notwithstanding, for the purposes of our deliberations, we are prepared to assume that this is the case. With regard to the transition provisions, we accept the petitioners' claim that these provisions, which establish the temporary administrations (s. 74(a) of the Plant Board Law and ss. 76-77 of the Poultry Board Law), do indeed deprive the boards (and the farmers' representatives) of the assets of the boards during the transition period in a manner that amounts to a violation of a constitutional right. Let us therefore consider whether the aforesaid violations of the property rights of the boards satisfy the terms of the limitations clause. Let us begin with the provisions of s. 73(b) of the Plant Board Law, and thereafter consider the transition provisions determined in the Agricultural Chapter.

Does section 73(b) of the Plant Board Law satisfy the terms of the limitations clause

44. In our case, no one disputes that the violation of the property rights was made by statute, and that the statute befits the value of the State of Israel as a Jewish and democratic state. We have also discussed how the provisions of the Agricultural Chapter are intended for a proper purpose (see at para. 34 *supra*). All that remains, therefore, is to consider whether the violation caused by the provisions of the aforesaid s. 73(b) to the property rights of the boards is excessive.

45. As stated above, according to the respondents, the purpose of the reforms that the Agricultural Chapter introduces is to reduce the costs of the regulation and to ensure a proper balance between the interests of all the parties affected by this regulation. According to the respondents' approach, the way to make the regulation of the aforesaid sectors more efficient and to reduce the costs of the regulation is to make structural changes, including a consolidation of the boards and a reduction in the number of mechanisms that fulfil similar functions. The petitioners raise doubts as to the effectiveness and

wisdom of this policy, but, as we said above in the context of the alleged violation of freedom of occupation, the question of the effectiveness of a particular method of regulation as opposed to a different method of regulation is not the concern of this court. The question whether it is preferable to regulate the agricultural sectors by means of a separate board for each sector or by means of one board that will consolidate the regulation of all these sectors is a question of economic policy, and the court will not intervene in this as long as the legislature has not departed from the zone of proportionality given to it.

In this case, we have been persuaded that the legislature did not depart from the zone of proportionality. The means chosen by the legislature — consolidation of mechanisms with similar functions into one consolidated body — is *prima facie* appropriate from a rational viewpoint to achieve a purpose of making the regulation more efficient and reducing the costs thereof. It is clear that in order to complete this structural change, there is a need for provisions such as the one in s. 73(b) of the Plant Board Law, which ensure that the Plant Board will replace the original plant boards in every respect, including with regard to their property, rights and duties. The aforesaid s. 73(b), which provides that on the date of commencement the plant boards will cease to operate, and their assets will become the property of the Plant Board, is therefore an appropriate and necessary measure in order to complete the aforesaid structural change, and this change is an appropriate measure for realizing the purpose of the Agricultural Chapter.

46. Moreover, a study of the sections of the Agricultural Chapter shows that whoever drafted the chapter adopted measures to reduce the violation that this structural change may cause to the property of the original boards and to the use that may be made of their assets. As stated above, the petitioners raised a concern that the consolidated board might not use the assets of the original boards for the benefit of their sector and the purpose for which the property right was created, but for the benefit of other sectors and for other purposes. But as we will see, mechanisms were provided in the law to allay this concern.

The consolidation of the plant boards in the Agricultural Chapter was made against a background of lessons that were learned from the experience of previous legislation, which involved the consolidation of the Fruit Board with the Citrus Fruit Marketing Board, and which, before it came into effect, was repealed by the Agricultural Chapter which is the subject of the petitions before us (see chapter 3 of the State Economy Arrangements (Legislative Amendments for Achieving the Budget Goals and the Economic Policy for the

2003 Fiscal Year) Law, 5763-2002; HCJ 10703/02 *Citrus Fruit Marketing Board v. Government of Israel* [45]). Unlike that law, which did not guarantee the designated use of the property of the original boards in accordance with the various sectors, in the Agricultural Chapter a certain separation was maintained between the various sectors within the consolidated board. Mechanisms were also provided for the purpose of protecting the specific interests of each of the sectors and their property and for preventing a cross-subsidy between the sectors. Thus, for example, the Plant Board Law contains provisions that are intended to ensure that the assets and money that belonged to each of the original plant boards will continue to be used only for the sectors of those boards, and that no sector will be liable for the debts of the other plant boards. Section 73(f) of the Plant Board Law provides the following:

> '(f)(1) The assets of the Vegetable Board, the Fruit Board, the Citrus Fruit Marketing Board and the Ornamental Plant Board shall be used for the vegetable sector, the fruit sector, the citrus fruit sector or the ornamental plant sector, as applicable; and if the assets as aforesaid are money — they shall be credited to the special fund account of each of the aforesaid sectors or of a kind or kinds of plant, as applicable, as they were credited to the fund accounts that existed before the date of commencement; for this purpose, "assets" — excluding debts and undertakings.
>
> (2) Debts and undertakings of the Vegetable Board, the Fruit Board, the Citrus Fruit Marketing Board and the Ornamental Plant Board that existed prior to the date of commencement, shall be financed out of the special fund of each of the sectors, as applicable.'

Moreover, section 73(d) of the same law provides:

> '(d) Any claim, appeal or other legal proceeding of the Vegetable Board, the Fruit Board, the Citrus Fruit Marketing Board and the Ornamental Plant Board or against them, as applicable, and also any ground for a claim, appeal or other legal proceeding as aforesaid, that were pending or existed, as applicable, prior to the date of commencement —

(1) shall continue to remain valid and shall be regarded as if they belonged to the board or were against it, as applicable;

(2) The expenses and outcome of these shall be credited or debited, as applicable, to a special fund within the meaning thereof in section 37, which shall be set up for each of the sectors, and shall be used for purposes that are for the benefit of each of the aforesaid sectors only, all of which as stated in section 37…'

In addition to these provisions, the Plant Board Law includes arrangements that will allow each sector to protect its individual interests, and also arrangements that will guarantee that the assets of each sector will be used for the benefit of that sector. Thus, for example, s. 10A of the Plant Board Law provides that a sector committee shall be appointed for each sector, and this will make recommendations to the board with regard to its actions with regard to that sector and with regard to the ways of administering the special fund for that sector. It is also provided in that section that the sector committee is entitled (and if the minister so demands — is obliged) to appoint for itself a sub-committee for each kind of plant, which will make recommendations to the board with regard to the actions of the board concerning that kind of plant and with regard to administering the special fund of that kind of plant. In order to give real weight to the recommendations of the sector committees, s. 7(e)(1) of that law provides that in several special matters that are set out there, including decisions concerning the assets that were held by each of the original plant boards before 1 January 2004, the board shall not make a decision concerning a particular sector contrary to the recommendation of the sector committee of that sector, unless there is a special majority of 75% of the voters, and at least half of the members are present at the meeting of the board. With regard to certain other matters, which are set out in s. 7(e)(2) of that law, the sector committees even have a right of veto, and it is provided that the board shall not adopt a decision concerning a particular sector which is contrary to the recommendation of the sector committee for that sector.

In this context, we should also point out that s. 4(b)(1) of the Plant Board Law provides that the number of farmers' representatives shall be at least half the number of members of the board, and it is also provided that on each sector committee the majority of its members shall be farmers from that sector (s. 10A(b) of the aforesaid law), and that on every sub-committee the majority of its members shall be farmers of that kind of plant (s. 10A(e) of the

aforesaid law). Thus s. 10(a) of the Plant Board Law also guarantees substantial representation for the farmers on the executive committee of the boards.

With regard to the structure of the budget of the consolidated board, it is stated in s. 41 of the Plant Board Law that the board's budget shall be divided into separate budget chapters for each sector and a separate general budget chapter for the board, and that the board may not transfer amounts from one budget chapter to another. Moreover, s. 37(a) of the Plant Board Law provides that the money from the charges levied from sectors or for a kind or kinds of plant for which sub-committees have been established under s. 10A, will be credited (after deducting the amounts designated for covering the expenses of the board's administration) to the account of a special and separate fund for each of the aforesaid sectors or kinds of plants only. Nonetheless, it is provided that the board may, with the approval of the minister, transfer up to 10% of the money from the aforesaid charges to the account of a general fund in order to carry out acts that are for the benefit of various kinds of plant, charge each special fund for the administrative expenses in accordance with a division between the funds that will be determined by the board, and return to the farmers the balances of the money from the charges.

In summary, after we have studied the arrangements made by the Agricultural Chapter in the Plant Board Law, we are persuaded that the law contains measures that are intended to ensure that the vast majority of the assets of the original boards will continue to be used for the benefit of the sector and for the purpose for which the property credit was originally created. Therefore, we have not found that the provisions of section 73(b), with regard to the establishment of the Plant Board in place of the original plant boards and the transfer of their assets to the consolidated board, involve any disproportionate violation of the property rights of the original boards.

Do the transition provisions satisfy the terms of the limitations clause

47. The petitioners are also attacking, as we said above, the constitutionality of the transition provisions provided by the Agricultural Chapter with regard to the establishment of temporary administrations for the Plant Board and the Poultry Board (s. 74(a) of the Plant Board Law and ss. 76-77 of the Poultry Board Law). The petitioners claim that the significance of these provisions is that, during the transition period, the control of the assets of the boards is taken away from the boards (and from the farmers'

representatives on the boards), and is given *de facto* to the Minister of Agriculture.

The transition provisions set out in the aforesaid sections provide that the members of the agricultural boards shall cease holding office, and that in their stead the minister shall appoint temporary administrations, which will administer the boards during the transition period until the members of the new boards are appointed. A study of the transition provisions shows that these provisions do indeed give the minister and his ministry personnel considerable weight in the temporary administrations. Admittedly, the farmers are guaranteed a majority in the composition of the temporary administrations (three out of five members of the temporary administration for the Poultry Board are farmers, and four out of seven members of the consolidated temporary administration for the Plant Board are farmers), but these farmers are not elected representatives of the farmers, but they are appointed directly by the minister. To this we should add that the transition provisions *prima facie* give the temporary administrations all the powers granted to the boards and to their executive committee, and these powers naturally include control over the assets of the boards.

These transition provisions have troubled us considerably, since we have found that they involve an usurpation of the control over the assets of the boards, as the petitioners claim, and also a potential for a violation of the interest that the assets of the boards will be used for the purposes for which they were designated by the law. Therefore we have seen fit to examine, in greater detail, whether these transition provisions satisfy the terms of the limitations clause.

48. The purpose of the transition provisions set out in s. 74(a) of the Plant Board Law and in ss. 76-77 of the Poultry Board Law is to ensure the implementation of the reforms made by the Agricultural Chapter to the agricultural boards. As we explained above, the Agricultural Chapter and the reforms that it introduces satisfy the proper purpose test, and it follows that the transition provisions that are intended to ensure the implementation of the reforms are intended for a proper purpose. Let us therefore consider the proportionality of the transition provisions in accordance with the three sub-tests established in our case law (see *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [15], at pp. 436-437; *Israel Investment Managers Association v. Minister of Finance* [31], at pp. 385-386; *Menahem v. Minister of Transport* [30], at pp. 279-280).

49. The measure chosen by the legislature — setting up temporary administrations that will administer the boards during the transition period — is suited to the purpose of the transition provisions, i.e., to ensure the implementation of the reforms that the Agricultural Chapter makes to the boards. The purpose of the temporary administrations is to replace the members of the boards who held office before the Agricultural Chapter and to provide for the ongoing administration of the boards until the first members of the Plant Board are appointed (or until the new members are appointed as a result of the reform of the Poultry Board) in a manner that will ensure the implementation of the reforms that the Agricultural Chapter makes to the boards. In her response to the petitions, counsel for the respondents insisted that the need for appointing temporary administrations to replace the existing boards arises from the concern that the outgoing boards will act in a way that may harm the implementation of the law or even prevent it. The concern, according to counsel for the respondents, is that the outgoing boards will act unilaterally and carry out irreversible acts, such as a transfer of assets from the boards to other bodies and a distribution of money to the farmers, in order to undermine the implementation of the law to which they have declared their opposition. The claim is that this concern is strengthened especially in view of the fact that the members of the outgoing boards are injured by the reforms personally, since the significance of the reforms, *inter alia*, is the termination of their office and adopting a new method of appointment that may affect their chances of being returned to office. Counsel for the respondents also seeks to argue that the aforesaid concern is not a theoretical one but is based on lessons learned in the past against the background of an attempted consolidation that was supposed to take place between the Fruit Board and the Citrus Fruit Marketing Board, in accordance with chapter 3 of the State Economy Arrangements (Legislative Amendments For Achieving the Budget Goals and the Economic Policy for the 2003 Fiscal Year) Law, 5763-2002.

From all of the above it follows that implementation of the reforms that the Agricultural Chapter makes requires the cooperation of the boards, and that *prima facie* there is a concern that the boards that hold office have an interest in preventing the aforesaid reforms. The measure chosen in order to allay this concern is the removal of control from the bodies that may have a *prima facie* interest in preventing the reforms (the members of the boards who held office before the Agricultural Chapter) and the transfer of control to bodies that can be relied upon to cooperate with the Minister of Agriculture (the temporary administrations, which are made up, it will be recalled, of representatives of

the minister and of farmers who are appointed by him). There is no doubt that this is an appropriate measure for realizing the purpose of the transition provisions, and that this measure — if not abused — may rationally ensure the implementation of the reforms to the boards.

50. A more difficult question is whether the transition provisions under discussion satisfy the second sub-test of proportionality — the test of the least harmful measure. As stated above, the harm to the property of the boards lies in the fact that the control of the boards during the transition period passed from them to a body that is controlled to a large extent by the minister, and in the fact that the power of the temporary administrations — including with regard to the control of the boards' assets — was not restricted in comparison to the power of the boards before and after the transition period. As we have seen, the measure chosen by the legislature is an appropriate measure, and it is doubtful whether it is possible to guarantee the implementation of the reforms without establishing the temporary administrations. But the legislature must consider the question whether there are measures that can reduce the potential violation of the boards' property rights without harming the chances of implementing the reforms. It would appear that the term of office of the temporary administrations should have been limited until the appointment of the first members of the board and that the power of the temporary administrations should have been limited to the ongoing management of the boards only. In this vein, it was even held in the interim order that was made on 28 July 2003 that the temporary administrations should only make use of the property and assets of the board for their ongoing administration. Do the transition provisions imply any such restrictions that may reduce the degree of the violation of the boards' property rights during the transition period?

51. With regard to the scope of the powers of the temporary administrations, no one disputes that there is no express provision in the temporary provisions that restricts the power of the temporary administrations to the ongoing management of the boards. The language of the transition provisions in the Plant Board Law and in the Poultry Board Law provides that the temporary administration '…shall administer the board and it shall be given the powers held by the board and its executive committee' (s. 74(a)(5) and s. 76 of these laws, respectively). The petitioners claim that this broad authorization allows the minister to do whatever he wants with the boards and their assets during the transition period. By contrast, counsel for the respondents argues that it is clear that the purpose of the temporary administrations is to conduct the ongoing management of the boards, and that

it is clear that the members of the temporary administration must act in the national interest and refrain from irreversible steps. Thus, for example, she argued in her response to the applications of the petitioners for interim orders with regard to the plant boards that 'there is no basis at all for the concerns of the petitioners that the temporary administrations will act in a way that will create irreversible situations… all that the temporary administrations will do is to deal with the ongoing management of the boards and to provide assistance to the staff at the Ministry of Agriculture headquarters, which will act in order to prepare the consolidation of the boards' (p. 26 of the respondents' response to the petitions concerning the plant boards).

Indeed, the scope of the powers of the temporary administrations should ideally be stipulated expressly within the framework of the transition provisions, but even without such an express provision it is clear that the proper interpretation of the transition provisions is that the power of the temporary administrations is limited to the ongoing management of the boards and to assisting the implementation of the reforms introduced by the Agricultural Chapter, and that the temporary administrations have no power to make any use of the boards' assets that departs from these purposes. This interpretation is derived from the purpose of setting up the temporary administrations, which is the management of the boards until the election of the new members in order to guarantee the implementation of the provisions of the Agricultural Chapter. This interpretation derives also from the duty of the temporary administrations, like any administrative authority, to act as public trustees in accordance with the purposes stipulated for them in the law. Any other interpretation to the effect that there is no restriction on the power of the temporary administrations during the transition period will place the transition provisions in danger of unconstitutionality because they do not satisfy the proportionality test. In any case, once the respondents have taken upon themselves the interpretation that limits the power of the temporary administration to ongoing operations, this is sufficient to guarantee that the transition provisions will not lead to a disproportionate violation of property rights.

52. The additional question — whether the Agricultural Chapter restricted the term of office of the temporary administrations — depends upon the interpretation of the relevant transition provision. Section 74 of the Plant Board Law provides that the transition provisions for the purpose of the temporary administrations shall apply 'until the appointment of the first members of the board under section 75…', whereas s. 75 of that law states:

> '75.(a) The minister shall appoint, within a year from the date of commencement, the first members of the board under section 4, according to its wording pursuant to amendment no. 6; if the minister does not appoint the members as aforesaid within the aforesaid period, the consolidated temporary administration shall continue to operate until they are appointed.
>
> (b) On the day when the first members of the board are appointed as stated in sub-section (a), the consolidated temporary administration shall cease operating.'

A similar arrangement was provided in the Poultry Board Law. Section 76 of the aforesaid law addresses the establishment of the temporary administration for the Poultry Board, whereas s. 77 of the same law provides:

> '77.(a) The members of the board, who held office before the date stated in section 76, shall cease holding office on the date of appointing the temporary administration under the provisions of section 76 and, within a year of the aforesaid date, the minister shall appoint the new members of the board in accordance with the provisions of this law according to its wording in chapter 11 of the Israel Economic Recovery Programme Law… If the minister does not appoint the members of the board within the aforesaid period, the temporary administration shall continue to operate until they are appointed.
>
> (b) On the day when the members of the board are appointed as stated in sub-section (a), the temporary administration shall cease operating.'

These sections therefore provide that the temporary administration shall cease operating on the day when the first members of the Plant Board and the Poultry Board are appointed. With regard to the date of appointing the first members of the Plant Board, it is stipulated that their appointment shall take place within a year of the date of commencement (i.e., a year from 1 January 2004), whereas with regard to the date of appointing the first members of the Poultry Board, it is stipulated that their appointment shall take place within a year of the date of appointing the temporary administration (i.e., a year from 1 June 2003). Thus we see that the Agricultural Chapter limited the period of operation of the temporary administrations, and it would appear to be a

reasonable period, which is not excessive, in view of the scope of the reforms that the Agricultural Chapter makes. Admittedly, the period of operation of the temporary administrations for the plant boards is longer than the period of office of the temporary administration for the Poultry Board, but this difference is justified in view of the fact that an additional reform (consolidation of the boards) was made to the plant boards, and this requires additional time for organization.

Notwithstanding the aforesaid, the petitioners claim that there is *de facto* no limit on the period during which the temporary administrations will hold office, and that in practice the Agricultural Chapter created an unlimited, and therefore disproportionate, transition period. This is because of what is stated at the end of s. 75(a) of the Plant Board Law and at the end of s. 77(a) of the Poultry Board Law, according to which: '…If the minister does not appoint the members of the board within the aforesaid period, the temporary administration shall continue to operate until they are appointed.' The question is, therefore, what is the relationship between the first part of the two aforesaid sections, which provides a time framework for the appointment of the first (or, in the case of the Poultry Board, the new) members of the board, and the last part of those sections. Does the last part seek to exempt the minister from the time framework provided in the first part? In other words, are the times set out in the first part of the two aforesaid section, as the petitioners claim, merely a recommendation, and in practice the minister has the power to extend indefinitely the transition period during which the temporary administrations will hold office?

The aforesaid interpretation, which is a matter of concern for the petitioners, is unacceptable to us. Our opinion is that the time framework stipulated for the minister in the first part of s. 75(a) of the Plant Board Law and of s. 77(a) of the Poultry Board Law is binding. The last part of those sections is not intended to exempt the minister from his duty to comply with the time framework provided in the first part, but it is intended to prevent a situation of a 'vacuum' in the management of the boards if, for some reason, there is a situation, which is not supposed to occur, in which the members of the board are not appointed by the end of the stipulated period. The provision in the aforesaid sections with regard to the date of appointing the new members of the board is a 'guiding' provision, and consequently the minister is liable to carry it out:

> 'The classification of the provision… as a "guiding provision" does not mean from the outset that it need not be upheld, or that it may be ignored. When the legislature stipulated a time for doing an act, the authority may not allow itself the liberty of treating it merely as "good advice," and it ought to be meticulous with regard to the timetable determined by the legislature in order to ensure proper administrative practice. The fact that a provision is a "guiding provision" does not derogate from its mandatory nature vis-à-vis the authority when it prepares its policies and its mode of operation. The result of classifying the provision as a "guiding" provision will be examined in cases where the authority does not succeed in complying with the timetable stipulated by the legislature, usually retrospectively, within the framework of examining the validity of the administrative act that was not carried out in accordance with the provisions of the law…' (HCJ 5992/97 *Arar v. Mayor of Netanya, Poleg* [46], at p. 655).

Moreover, the interpretation that the Agricultural Chapter created an unlimited transition period, in which the temporary administration will administer the boards without any time limit, is inconsistent with the purpose of the transition provisions. Transition provisions are, by nature, intended to be used only as a temporary 'transition' to the permanent arrangement that will follow them, and therefore the temporary administrations are also, by nature, 'temporary.' Furthermore, the specific purpose of the transition provisions in our case is to ensure the implementation of the reforms to the boards, including the election of representatives of the farmers by the farmers in a democratic process. An interpretation that will postpone the election of the farmers' representatives by the farmers and that will delay the implementation of the reforms to the boards is therefore entirely contrary to the purpose of the transition provisions. Consequently, the provisions of the Agricultural Chapter should be interpreted as restricting the period during which the temporary administrations hold office by means of determining a time framework in accordance with what is stated in the first part of s. 75(a) of the Plant Board Law and of s. 77(a) of the Poultry Board Law.

53. The petitioners raised before us an additional argument with regard to s. 75(a) of the Plant Board Law and s. 77(a) of the Poultry Board Law, which also poses a question of interpretation. According to the petitioner, the aforesaid sections provide that the first representatives of the farmers on the new boards that will replace the temporary administrations will not be elected

by the farmers but will be appointed by the minister. In view of this, the petitioners claim that the arrangement provided in the Agricultural Chapter is not proportionate, since there is no justification for the minister controlling the composition of the boards (and indirectly also the boards themselves and their assets) even after the transition period.

In this matter also we do not accept the interpretation of the petitioners. Section 75(a) of the Plant Board Law says: 'The minister shall appoint… the first members of the board under section 4, according to its wording pursuant to amendment no. 6…', whereas s. 77(a) of the Poultry Board Law says: '… the minister shall appoint the new members of the board in accordance with the provisions of this law according to its wording in chapter 11 of the Israel Economic Recovery Programme Law…'. One should not be misled in the interpretation of these sections of the law by the phrase 'the minister shall appoint.' The reason for this is that in both sections it is emphasized that the appointment of the members of the board will be made in accordance with the provisions of the laws, according to their wording after the amendments that the Agricultural Chapter made to them. In other words, the aforesaid sections say that the appointment of the members of the council will be made in accordance with the new system of appointment created by the Agricultural Chapter, i.e., the election of the farmers' representatives by the farmers in general elections. The aforesaid s. 75(a) even refers expressly to s. 4 in its wording after the amendment, according to which '…The members stated in this paragraph [i.e., the farmers' representatives] shall be elected by the farmers of each sector, from among themselves, in general and secret elections, as the ministers shall determine' (square parentheses supplied). Note than in the aforesaid s. 4 the legislature also uses the expression 'the ministers shall appoint,' even though it is clear that the intention is that the farmers' representatives shall be elected by the farmers in general and secret elections. The same is true in the parallel section in the Poultry Board Law, s. 9, which says:

'Representatives of the farmers

9. (a) *The ministers shall appoint* to the board members who are representatives of the farmers, from each sub-sector, who shall number no less than half the members of the board…

(b) *The members stated in sub-section (a) shall be elected by the farmers, from*

> *among themselves, in general and secret elections*, as shall be determined by the ministers in rules, with the approval of the Economic Committee of the Knesset.'

(Emphases supplied).

The conclusion is therefore that the correct interpretation of these provisions of law is that the farmers' representatives on the first boards that will replace the temporary administrations shall also be elected by the farmers in accordance with the new method provided in s. 4 of the Plant Board Law and in s. 9 of the Poultry Board Law.

54. In summary, had there been any substance to the petitioners' arguments that the law under discussion does not limit the period of office of the temporary administrations and their power to make use of the assets of the boards, and that the first members of the board will not be appointed in accordance with the method provided in s. 4 of the Plant Board Law and in s. 9 of the Poultry Board Law, it is possible that this would be sufficient reason to declare the transition provisions void for the reason that they would not satisfy the test of proportionality. But now that we have clarified that this is not the correct interpretation of the transition provisions, we must conclude that the measures chosen by the legislature within the framework of the transition provisions do not depart from the zone of proportionality.

55. The third sub-test of proportionality — the test of proportionality in the narrow sense — is also satisfied in this case. As we said above, the transition provisions were intended to ensure the implementation of the reforms that the Agricultural Chapter makes to the agricultural boards. These provisions are an appropriate measure for realizing this purpose, and this measure does not depart from the zone of proportional measures. In addition, there is a proper proportion between the benefit that will arise from the realization of the aforesaid purpose and the scope of the violation of property rights by the transition provisions. Improving the regulation of the agricultural sectors — in order to ensure a fair balance between the rights of all the sectors that are affected by this regulatory activity, while making the regulatory mechanisms more effective and saving costs — is, according to the outlook of the legislature and the government, an important social need. As we have said, the alleged violation of property rights arises from the transfer of control of the boards and their assets during the transition period from the boards (and the farmers' representatives) to the temporary administrations, which are

controlled to a large extent by the minister, but now that we have determined that the role of the temporary administrations is limited to ongoing management of the boards, and now that we have seen that the term of office of the temporary administrations is limited, it becomes clear that we are not dealing with a violation that is likely to undermine the proper balance between the benefit arising from the chosen legislative measure and the violation of the constitutional right.

The result is therefore that the transition provisions are intended for a proper purpose, and their violation of property rights, in so far as it exists, is not excessive. Subject to the aforesaid restrictions concerning the activity of the temporary administrations and their term of office, the transition provisions therefore satisfy, as do also the other provisions of the Agricultural Chapter, the tests of the limitations clause. Therefore we have not found that the Agricultural Chapter contains any unlawful violations of the boards' property rights. It need not be said that should the petitioners have complaints with regard to the implementation of the Agricultural Chapter by the responsible administrative authorities, they will be entitled to avail themselves of the lawful methods for challenging administrative acts.

56. In summary, we have examined the many contentions of the petitioners with regard to the legislative process and constitutionality of the Agricultural Chapter, and we have expanded upon the arguments that we regarded as worthy of elucidation. At the end of the examination, we have reached the conclusion that even though the rushed legislative process that took place in this case should ideally not have been adopted, we have not found in the legislative process used for the Agricultural Chapter a 'defect that goes to the heart of the process' that might have justified declaring the chapter to be void. We also examined the petitioners' claims against the constitutionality of the Agriculture Chapter, and we did not find that it contains any violations of a constitutional basic right that does not satisfy the terms of the limitations clause. The Agricultural Chapter therefore passed the constitutional test. The other claims of the petitioners, in so far as they relate to a concern as to the manner in which the provisions of the Agricultural Chapter will be implemented, will be examined in accordance with the criteria of the rules of proper administration, and it is to be assumed and hoped that the new law will be put into operation properly in accordance with those rules.

For these reasons the petitions are denied without an order for costs.

President A. Barak

I agree.

Justice M. Cheshin

The Israel Economic Recovery Programme (Legislative Amendments for Achieving Budgetary Goals and the Economic Policy for the 2003 and 2004 Fiscal Years) Law, 5763-2003 ('the law' or 'the Economic Recovery Programme Law'), in chapter 11, introduced a major revolution in the regulation of the agricultural economy in Israel. Section 49(50) of the law repealed the Citrus Fruit Supervision Ordinance, 1940, the Citrus Fruit Marketing Ordinance, 1947, the Citrus Fruit (Supervision and Marketing) Ordinance, 5708-1948, the Vegetable Production and Marketing Board Law, 5719-1959, and the Ornamental Plant (Production and Marketing) Board Law, 5736-1976. Major changes were also made to the Fruit Board (Production and Marketing) Law, 5733-1973, and the Poultry Board (Production and Marketing) Law, 5724-1963. The essence of the revolution was an end to the autonomy of the various agricultural boards and the concentration of the main powers in the hands of the Minister of Agriculture. For decades, agricultural matters in Israel were regulated in accordance with the provisions of these and other ordinances and laws, until they were abolished in the Economic Recovery Programme Law. Thus, with a thrust of the pen — or, should we say, with a thrust of the sword — all those laws gave up their lives, thus beginning a new era of compulsory arrangements in the various agricultural sectors.

2. I will not express an opinion on the merits of the arrangements, neither the old arrangements that have vanished nor the new arrangements that have replaced them, and in the circumstances of the case I see no alternative to denying the petitions. But I wanted to mourn the legislative process, a process that has made the Knesset — the Israeli legislature — into an empty shell. This is not the way to bring an end to laws that existed for so many years, laws that were part and parcel of agricultural life in Israel, laws that farmers have followed for decades. We see that the draft Economic Recovery Programme Law — a programme that is all-embracing in its content — was tabled in the Knesset on 30 April 2003. On the same day, a vote was held at the first reading, and the law was referred to the Finance Committee for deliberations. The Finance Committee devoted less than one session to the Agricultural Chapter in the draft law, whereas in the House the Agricultural Chapter was merely the subject of a short debate (a few pages out of hundreds of pages of minutes). The voting at the Finance Committee on all the provisions of the draft law took place at one marathon meeting, and the same

happened at the second and third readings. The law is 111 pages long (*Sefer HaHukkim* (Book of Laws) 5763 (2002-2003), pp. 386-496). Anyone who looks at the legislative process cannot fail to receive the impression that everything was done in a rush, under pressure, without any ability to consider in depth the reform that the draft law wished to make in the regulation of agriculture in Israel.

3. 'The Knesset is the legislature of the State' — this is the declaration of s. 1 of the Basic Law: the Knesset — and it is the legislative authority. There is no legislature other than the Knesset, and it determines, or at least it should determine, the main regulatory arrangements according to which life in Israel is conducted. The principle of the separation of powers and the decentralization of power teaches us that the Knesset has its own powers and the government has its own powers, and although these powers are sometimes found to overlap, we all know the main powers and are supposed to respect them. So the question is: when the people went to the ballot box to elect their representatives in the Knesset, did they empower those representatives to enact laws in the way that the Economic Recovery Programme Law was enacted? The question is a rhetorical one: certainly not. The people chose their elected representatives to debate thoroughly any draft laws brought before them, so that they think about their content, talk among themselves, exchange ideas, argue, and thereby properly scrutinize the conduct of the government. It is for this reason that the elected House is called parliament, from the word *parler*, meaning to speak. All of these aspects were absent from the debate on the draft Economic Recovery Programme Law, if only because the members of the Knesset were not given time to read thoroughly what was brought before them — to read, think, exchange opinions. From a formal viewpoint — as my colleague Justice Beinisch well described — the Economic Recovery Programme Law is a law for all intents and purposes, a law like any other. But from a substantive viewpoint — and this is the essence — it is hard to describe the law's legislative process as a proper process. When we look at the legislative process from beginning to end, we see that *de facto* it was the government that enacted the Economic Recovery Programme Law. It was as if the Knesset were deprived of its main power of enacting legislation, and it transferred its power to the government. The Knesset willingly assented to the decision of the government and voluntarily gave up its power — the supreme power of the legislature — to regulate the life of the State.

4. It is as if all the principles that make up democracy in Israel — the separation of powers, the decentralization of power, transparency, publicity,

participation of the people in legislation — were forgotten. What happened to the Knesset — or, should we say, what happened to the government — that it was in such a hurry that, in so rushed a process, it abolished the old arrangements in the Economic Recovery Programme Law? Was it not fitting that interested parties should be allowed to express their opinion publicly with regard to the revolution that the draft law sought to introduce? Is it a daily occurrence that major legislative arrangements undergo complete transformations? But the Knesset was a knowing partner in the rushed process that took place, and thus it was *de facto* stripped of its power as the supreme authority in the State. The day on which the Economic Recovery Programme Law was enacted, at least in so far as its Agricultural Chapter is concerned, is not a glorious day for the legislative process of the Knesset.

5. The principle of the separation of powers and the decentralization of power is not a theoretical principle that is learned in esoteric seminars in remote universities; it is a principle that is learned from life and from the bitter experience of countries that did not have either the separation of powers or the decentralization of power.

6. What is the decentralization of power? For optimal decentralization of power, the chosen formula — which also comes from experience — is that of checks and balances. The essence of the formula is this: each of the three powers involved in government has its own branch, in which it has sole power — the legislative branch, the executive branch and the judicial branch. At the same time, each power counter-balances the two other powers and is counterbalanced by the two other powers, so that no power is harmed by another and no power seizes control of the branches of the other two powers. The powers are therefore separate from one another, but also connected to one another. We are speaking of a kind of roundabout with three seats. The art of statesmanship is to maintain balance, and for the roundabout to rotate gently for the benefit of all. However, when one of the powers tries to exceed its authority, or when one of the riders on the roundabout upsets the balance, arrangements are undermined and the whole system of government is shaken. I fear that the Economic Recovery Programme Law — like the various Arrangements Laws — is capable of shaking the system far more than that the desired amount. This continental drift brought about by the Economic Recovery Programme Law and the various Arrangements Laws — a *de facto* transfer of the legislative branch to the executive — involves many great and terrible risks, the implications of which require study.

7. I have reviewed the judgment in HCJ 4128/02 *Man, Nature and Law Israel Environmental Protection Society v. Prime Minister of Israel* [47], and I see that the path followed by the Economic Recovery Programme Law was the same path followed by the law in the previous year, namely the State Economy Arrangements (Legislative Amendments for Achieving Budgetary Goals and the Economic Policy for the 2002 Fiscal Year) Law, 5762-2002. There too we lamented the legislative process. As we said in that judgment (paras. 2 and 3 of my opinion, at pp. 523-525):

> 'Everyone agrees that these new legal arrangements have created a revolution in the Planning Law, and the legislature saw fit to make this revolution precisely in the Arrangements Law, a law that the Knesset acted with the speed of lightning…
>
> …
>
> With a shortened and rushed timetable… airports, ports, water reservoirs, power stations, storage facilities for gas and petroleum, aboveground or underground lines for conducting electricity, water installations, sewage infrastructures, crude oil storage facilities, and so forth will be constructed and built. This is how the infrastructures on which the State is constructed will be established…
>
> And in these periods of time — periods of days — fundamental processes are supposed to be started and completed. Really? It is no wonder that this is how a survey of environmental effects was pounded and smashed into smithereens precisely when building infrastructure facilities whose effect on the environment is the greatest. Were we speaking of secondary legislation, then, I think, we would declare the secondary legislation unreasonable in the extreme and void *ab initio* because it would be legislation that violates the basic rights of the individual to live in a civilized country; but since we are speaking of statute passed by the Knesset, and there is *prima facie* no violation of the basic rights set out in the Basic Law: Human Dignity and Liberty and in the Basic Law: Freedom of Occupation, we will bow our heads and say: the statutory arrangements are unreasonable in the extreme, but since the fruit grew on the tree of the supreme legislature, the law is law and binds everyone.'

8. My observations and thoughts remain unchanged, so I said to myself: let me return to the studies of my youth, and read the words of the wise from years past. I therefore opened *The Spirit of Laws* by Charles, Baron de Montesquieu (translated by Thomas Nugent and edited by J.V. Prichard). I have re-examined his words, and I will quote from the remarks of that genius three passages from book eleven, 'Of the Laws Which Establish Political Liberty, with Regard to the Constitution,' chapter six, 'Of the Constitution of England:'

> 'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> ...
>
> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.
>
> ...
>
> Were the legislative body to be a considerable time without meeting, this would likewise put an end to liberty. For of two things one would naturally follow: either that there would be no longer any legislative resolutions, and then the state would fall into anarchy; or that these resolutions would be taken by the executive power, which would render it absolute.'

What is implied by these remarks needs to be put into practice.

9. Shall we say, as the poet did (Ecclesiastes 1, 9 [54]), that 'what was is what shall be, and what was done is what shall be done, and there is nothing new under the sun'? Let us hope that this is not the case. Let us therefore call upon the Knesset to act like a Knesset, to make its voice heard, to scrutinize and supervise as we expect it to do. In the dignity of the Knesset we shall all find dignity. Will the Knesset come to itself and mend its ways? Only the Knesset and the Speaker of the Knesset know the answers.

Petitions denied.

12 Tishrei 5765.

27 September 2004.